1999

James Gordon Holmes v. American States Insurance Company, Economy Auto Inc, and Clarendon National Insurance Company : Brief of Appellee

Utah Court of Appeals

Paul M. Belnap; Darren K. Nelson; Strong & Hanni; A.W. Lauritzen; Attorneys for Appellees.
Anthony R. Martineau; Ray G. Martineau; Attorneys for Appellant.

IN THE UTAH COURT OF APPEALS

JAMES GORDON HOLMES, Plaintiff/Appellant, vs. AMERICAN STATES INSURANCE COMPANY, a corporation; ECONOMY AUTO INC., a corporation; and CLARENDON NATIONAL INSURANCE COMPANY, a corporation, Defendants/Appellees.	)	**BRIEF OF APPELLEE AMERICAN STATES INSURANCE COMPANY** Case No. 990168 CA **PRIORITY 15**

BRIEF OF APPELLEE

APPEAL FROM:
ORDER AND PARTIAL SUMMARY JUDGMENT, DATED JUNE 10, 1998,
ORDER OF SUMMARY JUDGMENT, DATED JANUARY 22, 1998 AND
ORDER DENYING PLAINTIFF'S RULE 56(f) MOTION.

ATTORNEYS FOR PLAINTIFF/
APPELLANT
Ray G. Martineau
Anthony R. Martineau
3098 Highland Drive, Suite 450
Salt Lake City, Utah 84106
Telephone (801) 486-0200

ATTORNEYS FOR DEFENDANTS/
APPELLEES
American States Insurance
Paul M. Belnap
Darren K. Nelson
STRONG & HANNI
600 Boston Building
#9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

A. W. Lauritzen
Attorney for Economy Auto
610 North Main
P. O. Box 171
Logan, Utah 84321
Telephone: (435) 753-3391

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#9 Exchange Place
Salt Lake City, Utah 84111
Telephone: (801) 532-7080

A. W. Lauritzen
Attorney for Economy Auto
610 North Main
P. O. Box 171
Logan, Utah 84321
Telephone: (435) 753-3391

PARTIES TO THE PROCEEDING IN THE COURT BELOW

The caption of this case contains the names of all parties to the proceeding in the court below.

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JURISDICTION

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1999).

ISSUES FOR REVIEW

1. Did the trial court correctly dismiss plaintiff's causes of action as against American States when it found under the undisputed facts that American States did not qualify as a "seller," "supplier" or "dealer" for purposes of plaintiff's statutory claims, and that American States had no relationship, contractual or otherwise, with plaintiff.

2. Was the trial court within its broad discretion when it denied plaintiff's Rule 56(f) motion when the parties had conducted nine months of discovery and the trial court found that the motion was not well taken where additional discovery could not address the legal issues raised by American States' Summary Judgment Motion.

STANDARDS OF REVIEW

1. An appellate court reviews the trial court's grant of summary judgment for correctness, affording no special deference to the trial court's legal conclusions. Girbich v. Numed, Inc., 977 P.2d 1205 (Utah 1999).

2. An appellate court reviews the trial court's denial of plaintiff's Rule 56(f) Motion for abuse of discretion. See Crossland Sav. v. Hatch, 877 P.2d 1241, 1243 (Utah 1994); Callioux v. Progressive Ins. Co., 745 P.2d 838 (Utah Ct. App. 1987). Under this standard an appellate court will not reverse the trial court's decision unless the

decision exceeds the limits of reasonability. See Mast v. Overson, 971 P.2d 928, 930 (Utah Ct. App. 1998).

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

This case involves the application of the Utah Motor Vehicle Act as found in the Utah Code Ann. §§ 41-1a-1001-1005 (1999). This case involves the application of the Utah Motor Vehicle Business Regulation Act as found in Utah Code Ann. §§ 41-3-102, 103, 201 and 702 (1999). This case involves the interpretation of the several provisions of the Utah Uniform Commercial Code as found in Utah Code Ann. §§ 70a-2-104, 106 and 313 (1999). Finally, this case involves the interpretation of the Utah Consumer Sales Practices Act as found in Utah Code Ann. §§ 13-11-3 through 5 and §13-11-19 (1999). These provisions are attached in the addendum to this brief if such provisions have not already been provided in the addendum to the Brief of Appellant.

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW.

This appeal arises from Appellant James Gordon Holmes' ("Holmes") purchase of a 1994 American General Hummer ("Hummer") vehicle which he knew had been involved in an automobile accident. (R. 1-10, 585). The trial court found that under the undisputed facts Holmes' Complaint did not state a cause of action against American States. (R. 645-648, 871-72).

On February 4, 1997, Holmes filed a complaint against American States Insurance Company ("American States") and others, alleging that American States had violated the Utah Commercial Code, the Utah Consumer Sales Practices Act, the Utah Motor Vehicle Business Regulation Act and had breached fiduciary duties when Holmes received an 'unbranded' title to the Hummer. (R. 585). After the parties had conducted over nine months of discovery, American States filed a Motion for Summary Judgment on October 22, 1997. (R. 154-55, 586). American States' Motion argued that Holmes' statutory claims did not apply to them as they were neither the 'seller' 'dealer' nor the 'supplier' of Holmes' Hummer vehicle. (R. 152-55, 578-595).

On October 27, 1997, Holmes filed a Rule 56(f) Motion. (R. 199-200, 586). On January 30, 1998, the trial court denied Holmes' Rule 56(f) Motion for a continuance, determining that the Motion was not well-taken and that further discovery was not necessary to address the legal issues raised in American States' Motion for Summary Judgment. (R. 572-74, 586). However, the court did grant Holmes an extension to March 9, 1998 to respond to American States' Motion for Summary Judgment. (R. 572-574).

On June 10, 1998, Judge Wilkinson granted American States partial summary judgment and dismissed Holmes' alleged causes of action arising under the Utah Commercial Code, the Utah Consumer Sales Practices Act and the Utah Motor Vehicle Business Regulation Act and dismissed Holmes' claim based on fiduciary duty. (R.

648). The court found that American States did not qualify as a 'seller' to Holmes under the Uniform Commercial Code. (R. 646). The court found that American States did not qualify as a 'supplier' as contemplated under the Utah Consumer Sales Practices Act. (R. 646). The court determined that Holmes did not have a cause of action arising under the Utah Motor Vehicle Business Regulation Act as American States was not a 'dealer' and had not misled or fraudulently certified to Holmes that the Hummer was entitled to an 'unbranded' title as contemplated under the Act. (R. 645-648). The court found that the only remaining issue was whether the fact that Holmes was supplied with an 'unbranded' title led to an alleged failure of Holmes to receive a manufacturer warranty. (R. 645-649).

On September 18, 1998, American States filed a Motion for Summary Judgment as to the remaining issue in the case. (R. 657-658). In that motion, American States showed that it had performed no act that impaired the validity of the manufacturer's warranty. (R. 730-32, 778-79, 895). On October 5, 1998, Holmes filed a Motion for Reconsideration of the court's partial summary judgment order. (R. 693-707). On January 22, 1999, Judge Wilkinson reconsidered the previous pleadings and arguments in the case pursuant to Holmes' Motion to Reconsider, and affirmed his June 10, 1998 grant of partial summary judgment. (R. 871). In addition, the court granted American States' Motion for Summary Judgment as to the remaining issue in the case. (R. 871-872). The court found that American States' acts or omissions did not cause

Holmes to lose any benefit of the manufacturer's warranty on the Hummer. Accordingly, Holmes had no cause of action against American States as to whether the fact that Holmes applied for and received an 'unbranded' title led to any failure of Holmes to receive a manufacturer warranty. (R. 649, 871-872).

On February 22, 1999, Holmes filed a Notice of Appeal with the trial court appealing the trial court's entry of Partial Summary Judgment on June 10, 1998, the trial court's denial of Holmes' Rule 56(f) Motion as well as the court's entry of Summary Judgment on January 22, 1999. (R. 880-81). On June 9, 1999, the Utah Supreme Court transferred this action to the Utah Court of Appeals for disposition. (R. 890).

B. STATEMENT OF UNDISPUTED MATERIAL FACTS

The genesis of this case arises out of an automobile accident involving a Hummer vehicle that occurred on August 11, 1995. American States was the insurer of the Hummer prior to the accident. Following the accident, the vehicle was towed by Intermountain Tow to the Hummer dealership at Carleson Cadillac ("Carleson") in Salt Lake City, Utah. (R. 381, 390-91, 579). American States elected to pay its insured the pre-accident value of the vehicle to settle the claim for accident damages. (Id). Appellee Economy Auto Incorporated ("Economy"), an automobile dealer in the state of Utah, acquired the Hummer through a bidding process handled through Intermountain Tow. (R. 581, 647). Appellee Clarendon National Insurance Company ("Clarendon") issued the motor vehicle dealer bond for Economy. (R. 3, 8, 380).

Holmes examined and photographed the Hummer while it was stored at Carleson. (R. 579-580). While inspecting the Hummer, Holmes inquired of Carleson whether the vehicle was for sale. Carleson referred Holmes to American States who told Holmes they were unsure of what they would do with the vehicle. (R. 581). Holmes testified that:

> I called [the American States representative] on the phone and I asked her if they were going to sell the vehicle. And she said, we don't know what we're going to do with the vehicle. And that was the end of the conversation. We never spoke again.

(R. 581). Holmes would never again communicate with or receive representations from American States until after his purchase of the Hummer. (R. 581, 647).

After Economy purchased the vehicle, Holmes contacted its principal and made an offer to purchase the Hummer for $15,000 which was not accepted by Economy. (R. 581-83). Thereafter, Economy opted to consign the vehicle to an auto auction operated by Western Affiliated, not a party to this action. (R. 583, 894). The Hummer was subsequently purchased by Hillcrest Services, not a party to this action, at the auto auction. (R. 583, 647). Holmes attended this same auto auction and observed the Hummer while it was there, but did not purchase the vehicle. (R. 647). After researching the value of the Hummer, Holmes ultimately purchased the Hummer from Hillcrest Services in November, 1995. (R. 5, 583, 584).

Holmes received an assignment of title and he took that to the State of Utah and applied for an 'unbranded' title. (R. 583). Holmes' bill of sale indicated that the Hummer was sold "as accepted" and was not "guaranteed." (R. 162, 647). Holmes purchased the vehicle in the same condition as he had seen it at the Carleson dealership and at the auto auction. (R. 583, 648). Holmes admitted that he knew the vehicle was being sold in its damaged condition for salvage, and was in the exact same condition as when he inspected and photographed the Hummer at Carleson and at the auto auction. (R. 585, 648).

Holmes is experienced in the mechanics and repair of vehicles. (R. 584). He owns approximately 50 vehicles that he uses and makes available for movie production and other uses. (R. 585). Holmes proceeded to make repairs to the Hummer, including replacement of the hood, the windshield frame, the doors, the wheels, the quarter panel, the top assembly and fixed numerous dents along the Hummer's sides. (R. 583).

After repairing the above-referenced items on the vehicle himself, Holmes attempted to have certain warranty work performed on the Hummer at Carleson. When he did so, he was allegedly told by someone at Carleson that the manufacturer's warranty on the vehicle had been voided because of the vehicle had been "scrapped." (R. 506-507). Thereafter, Holmes filed this lawsuit against American States alleging damages

because he had applied for and received an 'unbranded title' from the State of Utah. (R. 1-10).[1]

The parties conducted discovery for approximately nine months. In response to Interrogatories and Requests for Production of Documents, American States provided Holmes with all documentation pertaining to how the loss was adjusted by American States with its insured. (R. 225-79, 306-46). American States also supplied Holmes with information on the chain of sale between American States, Intermountain Tow, Economy, and the other dealer entities. (Id.).

American States then filed a motion for summary judgment arguing that Holmes' causes of action based upon American States' alleged violations of Utah statutes should be dismissed as a matter of law. Thereafter, Holmes filed a Rule 56(f) Motion and a Motion to Compel Discovery. (R. 193). The parties fully briefed both motions and argued the same before the trial court.

At the hearing on the matter, the trial court looked at the issue pertaining to the chain of title and the documentation showing the way in which American States adjusted the loss. (R. 572-74, 893). The trial court determined that the additional discovery sought by Holmes would have no bearing on the legal issues raised by

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[1] It is important to note that Holmes has subsequently sold the Hummer to another purchaser. Holmes sold the Hummer with the 'unbranded' title that he had originally applied for and received from the State of Utah.

American States' Motion for Summary Judgment. (Id.). Holmes had already been provided material regarding the chain of sale and documentation pertaining to the adjustment of loss. (R. 225-79, 306-46). Holmes had the opportunity to perform additional discovery and never requested such until American States filed the Motion for Summary Judgment. (R. 572-74, 893). Therefore, the trial court denied Holmes' 56(f) Motion and Motion to Compel Discovery. (R. 572-74). The court granted Holmes a six-week extension in which to respond to American States Motion for Summary Judgment.

Ultimately, the court granted American States Partial Summary Judgment and dismissed Holmes' alleged causes of action arising under the Utah Commercial Code, the Utah Consumer Sales Practices Act and the Utah Motor Vehicle Business Regulation Act. (R. 648). However, the court left one issue in the case: Whether American States performed any act or omission which caused Holmes to lose the benefit of the manufacturer's warranty. (Tr. of Hr'g on Defs'. Mot. for Summ J. at 35, attached to appellant's brief in the addendum).

American States then moved for summary judgment as to this remaining issue in the case. (R. 657-661). American General, the manufacturer of the vehicle established via affidavit that the Hummer's warranty was in full effect throughout the entire manufacturer warranty period. Therefore, the manufacturer's warranty expired on its own terms. (R. 730-32, 778-79, 895). In addition, Carleson Cadillac established that any notation on the dealership's computers or invoices that the Hummer had been

'scrapped' or that the warranty was void, was in error and was not an official act of the dealership or the manufacturer. (R. 662, 730-32, 778-79, 895).

Holmes submitted an affidavit from a parts repairman, Christopher Haderlie, out of Jackson, Wyoming. Haderlie testified that he contacted AM General on an unknown date and spoke with an unknown person about the Hummer's warranty. He was allegedly informed that the Hummer's warranty had been deleted from the AM General system. (R.726, 765-69). The court found that the Haderlie affidavit was hearsay. Nevertheless, the trial court considered the same in opposition to the motion for summary judgment. (R. 871, 894). Despite the fact that Holmes submitted a contradictory affidavit into evidence pertaining to the existence or non-existence of the manufacturer's warranty, the trial court found, as a matter of law, that Holmes had no cause of action against American States for the alleged wrongful denial of warranty work. (R. 727-28. 765-69, 894). Holmes' complaint should have been leveled against other entities that are not parties to this case.

SUMMARY OF THE ARGUMENT

A trial court correctly grants a motion for summary judgment when based on the undisputed facts, the moving party is entitled to judgment as a matter of law. See American Towers Owners Assoc. Inc., v. CCI Mechanical, Inc., 930 P.2d 1182 (Utah 1996). The material facts pertinent to the motions filed by American States were undisputed. In his complaint and through the various pleadings and hearings, Holmes

alleged that American States failed to obtain a branded title on the Hummer vehicle after it took possession of the same from its insured in accordance with Utah Code Ann. §§ 41-1a-1001 and 41-1a-1005(1)(a)(i) (1996). Therefore, Holmes alleged that American States was liable in damages to Holmes by virtue of Utah Code Ann. §§ 41-1a-1005(2) and 41-3-702(3)(c) (1996). See (R. 5, 509, 696-699, 894). Holmes wholly failed to establish a right to recovery pursuant to the above referenced statutes.

Holmes was unable to show that American States was a "dealer" as contemplated by the Utah Motor Vehicle Business Regulation Act. He was unable to show that American States "fraudulently certified" that the Hummer was entitled to an 'unbranded' title when it was not. Finally, under the undisputed facts of this case, American States owed no duty to Holmes. The trial court's legal determination regarding this cause of action should be affirmed.

In addition, Holmes alleged that American States was liable in damages to Holmes because it allegedly "knowingly and intentionally" performed a deceptive and unconscionable act or practice as defined in Utah Code Ann. §§ 13-11-4 and 13-11-5 (1996). (R. 6, 512). In further support of his cause of action, Holmes alleged that Utah Code Ann. § 70A-2-313 (1996) pertaining to express warranties between a seller and buyer was applicable. (R. 6, 513-515, 715). Holmes once again failed to establish a right to recovery in accordance with the above-referenced statutes. American States is neither a "seller" nor a "supplier" as contemplated by the above-referenced statutes. The

trial court correctly dismissed Holmes' cause of action as it related to the Utah Consumer Sales Practices Act and the Uniform Commercial Code.

Holmes alleged that American States breached its "fiduciary duties" to Holmes. (R. 7, 587). Although never pled, Holmes also argued that he was improperly denied warranty work on the Hummer vehicle after his purchase. (Tr. of Hearing pp. 33-38, attached as Addendum to Pl.'s opening brief). With respect to Holmes' breach of fiduciary claim, the undisputed facts clearly showed that American States and Holmes had no relationship with one another, let alone a "fiduciary relationship." The trial court correctly dismissed Holmes' cause of action against American States based on the breach of a fiduciary duty. With respect to Holmes' claim that he was improperly denied warranty work on the vehicle after he purchased the same, the trial court correctly determined that Holmes' complaint should have been leveled against other persons and entities that are not parties to this case. (R. 894).

Finally, Holmes alleged that the trial court abused its discretion when it denied his motion for a continuance made pursuant to Rule 56(f) of the Utah Rules of Civil Procedure. Through the nine months of discovery, American States provided Holmes with all documentation pertaining to the chain of sale on the Hummer vehicle. American States provided Holmes with all documentation regarding how the adjustment of loss was determined with its insured. The trial court reviewed this discovery and determined that the additional discovery requested by Holmes would not have addressed

the legal issues raised by American States' Motion for Summary Judgment. The trial court did not abuse its discretion in denying Holmes' request for a continuance where the requested additional discovery would have been unnecessary.

ARGUMENT

I. THE TRIAL COURT CORRECTLY CONCLUDED THAT HOLMES FAILED TO SHOW A RIGHT TO RECOVERY PURSUANT TO THE UTAH MOTOR VEHICLE DEALER ACT.

Throughout the proceedings of this case Holmes has repeatedly asserted that his right to recovery as against American States arises from American States' omission in not having the title to the Hummer vehicle "branded" when American States took possession of such from its insured. Therefore, according to Holmes, he is entitled to the civil remedies made available pursuant to Utah Code Ann. § 41-3-702(3)(c) (1996). That section indicates that the following is a civil violation: "fraudulently certifying that a damaged motor vehicle is entitled to an unbranded title, as defined in 41-1a-1001, when it is not." As a matter of law, the civil remedies found in § 41-3-702(3)(c) are not available to Holmes as against American States.

It has been undisputed throughout this case that American States is not a "dealer" of motor vehicles as contemplated by Utah Code Ann. §§ 41-3-102, 41-3-103 and 41-3-201 (1996). Indeed, § 41-3-103 expressly provides that "[a]n insurance company . . . coming into possession of a motor vehicle as an incident to its regular

business, that sells the motor vehicle under contractual rights that it may have in the motor vehicle is not considered a dealer." Chapter 3 of Title 41 is known as the Motor Vehicle Business Regulation Act. This Act applies to the regulation of businesses whose operations are closely tied with the sale and disposal of motor vehicles. For example, "dealers," "body shops," "dismantlers" and "crushers" are governed by the Act. The civil penalties made available to a "purchaser" as found in chapter 3 section 702(3) of the Act may be available as against one of the above-referenced entities. However, an insurance company is not regulated by this Act. Utah Code Ann. § 41-3-102 (1999). Because Holmes has no right of recovery as against an insurer under the plain language of the Act, his claim that he is entitled to the civil remedies provided for in § 41-3-702(c) fail as a matter of law. The trial court correctly dismissed Holmes' claim as against American States based upon its omission in not having the title to the Hummer "branded" upon taking possession of such.

Even if Holmes' claim that he is entitled to the civil remedies provided for in §41-3-701(3) represents a tenable position, the trial court nevertheless correctly dismissed Holmes' cause of action. The only way in which Holmes could recover for American States' alleged omission in not procuring a branded title for the subject vehicle was to establish that American States *fraudulently certified* that the subject vehicle was entitled to an unbranded title. Holmes recognized this principal in the briefing on the motion for summary judgment. (R. 510-511).

Holmes completely failed to show any facts to the trial court giving rise to an inference that American States *knowingly* engaged in a misrepresentation with the *intent to deceive* and or *induce reliance* thereon. See Gold Standard, 915 P.2d 1060, 1066-67 (Utah 1996). Facts giving rise to an inference of fraud at the summary judgment stage must be established by clear and convincing evidence. Andalex Resources, Inc. v. Myers, 871 P.2d 1041, 1046-47 (Utah App. 1994). As evidenced from Holmes' complaint and his continued reliance on the related statutes, he has known from the inception of this case the elements that must be established prior to a finding of any potential liability on the part of American States under § 41-3-702 and § 41-1a-1001.

Plaintiff's own deposition testimony supports the fact that American States never knowingly misrepresented a fact with the intent to induce reliance thereon:

> As a result of having taken the Hummer to the dealership for warranty repairs and finding out that this vehicle had been scrapped, I was told by the dealership who insured the vehicle. I, in turn called them, American States Insurance, and spoke with Paula. I do not recall her last name. I had indicated to her what I have told you here, and that is I bought a vehicle and I've come to find now by taking this vehicle into a dealership for warranty work that not only is the warranty invalid but that this vehicle was scrapped. What about this? Her response to me was Oh no. That was the end of her answer, "Oh, no," in about that tone of voice.
>
> * * *
>
> And we discussed further about the problem of what this meant to me as a buyer of a vehicle; that I have a vehicle that has no warranty; that if, in fact, this vehicle was scrapped, then someone did not identify the title or the vehicle as a salvage vehicle. And

> she said well, we — let me get this — I'm being as close as I can to my recollection here. But her comment to me at that point was, "We should have handled that. I left it up to Charles Fullmer."
>
> * * *
>
> [B]ut someone had towed this vehicle to Charlie Fullmer's Economy Auto place of business and that she was going to talk to these people and find out why this thing had not been salvaged titled. She did say that she had failed to do that and should have done it but had left it up to these other people.

(R. 506-07, 518-22).

Therefore, Holmes testified that Paula Fisher, claims representative for American States, specifically told Holmes that she mistakenly thought Intermountain Tow and/or Economy Auto would handle the title certification in accordance with legal requirements. No where is there any indication of an knowing misrepresentation and/or an intent to deceive or induce reliance.[2] Such testimony does not support a finding of liability on the part of American States for *fraudulently* certifying the title of the subject vehicle as unbranded. As set forth in § 41-3-702, such a finding must be a condition precedent to any liability on the part of American States.

This case is remarkable, therefore, in that Holmes seeks to hold American States liable to him for damage where American States and Holmes and absolutely no

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[2] Likewise, none of these facts show the existence of recklessness. Reckless misconduct results when a person, with no intent to cause harm [or deceive] performs an act so unreasonable that he or she knows that it is highly probable that harm will result See Matheson v. Pearson, 619 P.2d 321 (Utah 1980).

dealings or relationship with one another pertaining to the Hummer vehicle. The only representation ever made to Holmes prior to his purchase of the Hummer involved the following:

> I called [the American States representative] on the phone and I asked her if they were going to sell the vehicle. And she said, we don't know what we're going to do with the vehicle. And that was the end of the conversation. We never spoke again.

(R. 581).

The undisputed facts presented to the trial court clearly showed that prior to the above-referenced conversation, Holmes had examined and photographed the Hummer while it was stored at Carleson. (R. 183, 579-580). After American States delivered the vehicle to Economy Auto, Holmes again inspected the vehicle and made an offer on the same to Economy Auto's principal, Charles Fullmer. (R. 582). After that offer was rejected, Holmes continued to follow the vehicle through the chain until he ultimately purchased the same at the auto auction from Hillcrest Services. (R. 583-85). Holmes admitted that he performed research on the vehicle. (R. 584). Holmes admitted that the vehicle was in the same condition when he purchased it from Hillcrest as when he first inspected the Hummer at Carleson. Holmes admitted that he knew that he purchased the vehicle "as is." Holmes admitted that he owns approximately 40-50 vehicles that he has purchased and/or restored for use in his movie production business. (R. 585). As the trial court correctly noted in it ruling on the motion for summary judgment "it appears that the plaintiff may have buyer's remorse in this matter." (Tr.

Hearing p. 33 attached to Appellant's Addendum in opening brief). Holmes "was not at any time misled or misrepresented to, there was no fraud, he never relied on anything as far as statements, or on the branded or unbranded title." (Id.).

Holmes alleged liability on the part of American States pursuant to statutes which on their face give no remedy to Holmes as against American States. Holmes attempts to bootstrap liability by merging § 41-1a-1005 with §41-3-702(3)(c) which only applies to "dealers." Under the undisputed facts, American States owed no duty to Holmes. The statutes relied upon by Holmes from the inception of this case involve two different statutory schemes involving different entities. The trial court correctly dismissed Holmes' cause of action as against American States based on alleged violations of the Utah Motor Vehicle Business Regulation Act.

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT HOLMES FAILED TO SHOW A RIGHT TO RECOVERY PURSUANT TO THE UTAH CONSUMER SALES PRACTICES ACT.

The interpretation of a statute is a question of law for this Court to decide. Zoll & Branch, P.C. v. Asay, 932 P.2d 592 (Utah 1997). When interpreting a statute this Court must look at its plain meaning. Crossroads Plaza Ass'n v. Pratt, 912 P.2d 961, 965 (Utah 1996). Holmes' claimed right of recovery as against American States pursuant to the Utah Consumer Sales Practices Act as found in Utah Code Ann. § 13-11-4 (1996) is fallacious. The trial court properly dismissed this cause of action.

Section 13-11-3(c) of the Utah Code Ann. defines a "supplier" as a "seller, lessor, assignor, offeror, broker or other person who *regularly solicits, engages in, or enforces consumer transactions,* whether or not he deals directly with the consumer." Section 13-11-5 of the Utah Code Ann. prohibits certain sales practices of a "supplier." Section 13-11-19 of the Utah Code Ann. enables an consumer to bring a cause of action against such a "supplier" so long as the consumer suffers loss because of a violation found in § 13-11-5.

As discussed above, however, it has been undisputed throughout this case that American States is not a "dealer" of motor vehicles as contemplated by Utah Code Ann. §§ 41-3-102, 41-3-103 and 41-3-201 (1996). American States, as an insurance company, obviously does not regularly contract for the sale of automobiles to consumers. Pursuant to a plain reading of § 13-11-3, the only way in which American States may be liable to Holmes pursuant to the Consumer Sales Practices Act is if American States is a "supplier" of as defined by the Act. See Utah Code Ann. §§ 13-11-3(6), 13-11-4 (1996). That is, plaintiff must establish that American States "regularly solicits, engages in, or enforces consumer transactions" like the one involved in this case. Such is clearly not the case where American States is not in the business of buying or selling motor vehicles and certainly does not regularly solicit or engage in such practices.

American States does not meet this statutory definition and the trial court correctly determined such. (R. 646). Holmes failed to offer any material facts to the

contrary. Consequently, American States is not, by definition, an entity who "regularly solicits, engages in, or enforces consumer transactions" like the one at issue in this case. Despite Holmes' repeated assertions in the opening brief that this Court should construe the Consumer Sales Practices Act liberally, Holmes may not establish liability in American States where by definition, none exists. This Court should affirm the trial court's order on this point.

III. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFF'S BREACH OF FIDUCIARY DUTY CLAIM.

The question of whether a duty exists is a question of law to be determined by the court. Hunsaker v. State, 870 P.2d 893, 897 (Utah 1993); CT v. Martinez, 845 P.2d 246, 247 (Utah 1992). It is fundamental law that for a fiduciary duty to exist, there must be a fiduciary relationship between the parties. Microbiological Research Corp. v. Muna, 625 P.2d 690, 695 (Utah 1981). Under Utah law, a fiduciary or confidential relationship will be found only "when one party, having gained the trust and confidence of another, exercises extraordinary influence over the other party." Gold Standard, Inc. v. Getty Oil Co., 915 P.2d 1060, 1064 (Utah 1996), (quoting Van Hake v. Thomas, 705 P.2d 766, 769 (Utah 1985)). Furthermore, when the parties deal "at arm's length" or in an adversarial relationship, no fiduciary relationship can be said to exist. Gold Standard, 915 P.2d at 1064.

In this case, the undisputed facts showed that American States did not sell the subject vehicle to Holmes. The undisputed facts do not even establish an "arm's length" transaction. Indeed, no transaction occurred between Holmes and American States. The only "relationship" the parties had prior to Holmes' purchase of the vehicle was the single phone call to Paula Fisher at American States wherein plaintiff asked whether American States planned on selling the vehicle. (R. 581). As a matter of law, no fiduciary *relationship* existed between Holmes and American States. As such, no *duty* existed between Holmes and American States. American States could not have breached a non-existent duty. The trial court correctly dismissed this cause of action and this Court should affirm such.

IV. THE TRIAL COURT CORRECTLY DISMISSED PLAINTIFF'S UNPLED CLAIM THAT HE WAS WRONGLY DENIED WARRANTY WORK ON THE SUBJECT HUMMER.

It is well-established Utah law that a defendant is entitled to summary judgment when a plaintiff cannot establish a basis for recovery regardless of how the facts are resolved. Brown v. Weis, 871 P.2d 552, 559 n.7 (Utah App. 1994)(citing Abdulkadir v. Western Pac. R.R., 318 P.2d 339, 341 (Utah 1957)). Though not mentioned in his Complaint, Holmes claims that when he attempted to have warranty work done on the Hummer by Carleson Cadillac, he was forced to pay for the work to the vehicle and was told that the Hummer's warranty was no longer in effect after the accident. (R. 1-10, 713). Although such a claim goes more to Holmes' alleged

damages, if any, the trial court determined at the hearing on American States' Motion for Summary Judgment that "the only thing that I leave in this case is that question of whether the plaintiff's entitled to warranty work on that automobile." (Tr. of Hr'g on Defs.' Mot. for Summ. J. at 35 lines 7-15, attached to appellant's brief addendum). Therefore, after the trial court granted American States' partial summary judgment, the only issue involved was whether American States' acts or omissions led to Holmes' alleged wrongful denial of warranty work on the Hummer vehicle. (Id. at lines 16-19).

In subsequent briefing, American States moved for summary judgment on this issue. American General, the manufacturer of the vehicle established that the Hummer's warranty was in full effect throughout the entire manufacturer warranty period. (R. 730-32, 778-79, 895). American General established that the Hummer's manufacturer warranty was not voided when the vehicle was involved in an accident, and that the warranty expired only at the end of the warranty period on its own terms. (R. 730-32, 778-79, 895). In addition, Carleson Cadillac established that any notation on the dealership's computers or invoices that the Hummer had been 'scrapped' or that the warranty was void, was in error and was not an official act of the dealership or the manufacturer. (R. 662) The trial court found, as a matter of law, that Holmes' affidavit from Christopher Haderlie that the Hummer's warranty was voided was hearsay and even if contradictory, it did not establish a cause of action against American States. (R. 871,

894). The trial court had already determined that the alleged statutory causes of action of Holmes against American States should be dismissed.

It was undisputed that Holmes was been denied warranty work when he took the Hummer into Carleson Cadillac for repairs. However, that denial was not caused by American States. The trial court correctly determined that Holmes' complaints as to the denial of the warranty work should have been leveled against other entities not parties to this appeal such as, for example, Carleson Cadillac or AM General. (R. 871-72). This Court should affirm the trial court's ruling on this point.

V. THE TRIAL COURT CORRECTLY GRANTED AMERICAN STATES' MOTION FOR SUMMARY JUDGMENT AS TO HOLMES' U.C.C. CLAIM.

Because no contract, bargain or agreement for the sale of the Hummer ever existed between American States and Holmes, the trial court correctly granted American States' Motion for Summary Judgment as to Holmes' U.C.C. claims. Throughout this case Holmes has argued that he is entitled to recover alleged damages from American States because the U.C.C. provides a buyer certain remedies for a seller's alleged breach of an express warranty made during the bargaining process for the sale of a good. Article two of the U.C.C. presupposes the existence of a contract or bargain. The U.C.C. provides that:

(1) Express warranties by the seller are created as follows:

> (a) Any affirmation of fact or promise made by the *seller to the buyer* which relates to the goods and becomes part of the *basis of the bargain* . . .
> (b) Any description of the goods which is made part of the *basis of the bargain* . . .
> (c) Any sample or model which is made part of the *basis of the bargain* . . .

U.C.A. § 70A-2-313 (1999).

Utah courts have held that the express warranties provided for in the U.C.C. must involve a merchant who *contracted* for the *sale* of goods. See Salt Lake City Corp. v. Kasler Corp., 855 F. Supp. 1560, 1564-65 (D. Utah 1994); State v. GAF Corp., 760 P.2d 310, 314-15 (Utah 1988); Utah Co-op. Ass'n. v. Egbert-Haderlie Hog Farms, Inc., 550 P.2d 196 (Utah 1976).

> The U.C.C. provides that:
> (1) In this chapter unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 70A-2-401). A "present sale" means a sale which is accomplished by the making of the contract.

U.C.A. § 70A-2-106(1) (1998); see also Union Portland Cement Co. v. State Tax Comm'n., 170 P.2d 164 (1946). By the U.C.C.'s own terms, if a contract or bargain does not exist between the parties, the U.C.C. does not apply as a matter of law. See Salt Lake City Corp., 855 F. Supp. at 1564-65 (D. Utah 1994).

In this case, the undisputed facts show that American States is not a 'merchant' in relation to the sale of vehicles, that there was never any type of contract between American States and Holmes, and that no 'sale' occurred between American States and Holmes. (R. 581, 647). American States is not authorized under Utah law to contract for the sale of vehicles to consumers, and is not considered an automobile dealer in Utah. See U.C.A. § 41-3-205, 210, 404 (1998). As such, American States is not an entity that "deals" in vehicles. See U.C.A. § 70A-2-104(1) 1998).

The undisputed facts show that at no time did a contract exist between American States and Holmes. The undisputed facts show that American States never made a promise or representation regarding the status of the Hummer's title or any other aspect of the vehicle to Holmes. (R. 581, 647). Accordingly, no "contract for the sale of goods" ever existed between American States and Holmes. (R. 581, 647). The trial court correctly granted American States' Motion for Summary Judgment as to Holmes U.C.C. claim. See U.C.A. § 70A-2-313 (1998).

VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT PROPERLY DENIED HOLMES' RULE 56(F) MOTION.

Because additional discovery would have been irrelevant to the legal issues raised by American States' Motion for Summary Judgment, the trial court properly denied Holmes' Rule 56(f) Motion. An appellate court reviews a trial court's denial of a Rule 56(f) Motion for abuse of discretion. See Crossland Sav. v. Hatch, 877 P.2d 1241,

1243 (Utah 1994); Callioux v. Progressive Ins. Co., 745 P.2d 838 (Utah Ct. App. 1987). Under this standard an appellate court will not reverse the trial court's decision unless the decision *exceeds the limits of reasonability*. See Mast v. Overson, 971 P.2d 928, 930 (Utah Ct. App. 1998). As interpreted by Utah courts, Rule 56(f) provides that a party opposing summary judgment may submit an affidavit stating the reasons why he is unable to present evidentiary affidavits essential to support his opposition to summary judgment. See Callioux, 745 P.2d at 840; Utah R. Civ. P. 56(f). One commentator has stated that:

> The mere averment of exclusive knowledge or control of the facts by the moving party is not adequate: the opposing party must show to the best of his ability what facts are within the movant's exclusive knowledge or control; what steps have been taken to obtain the desired information pursuant to discovery procedures under the Rules; and that he is desirous of taking advantage of these discovery procedures.

Id. (quoting 2 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.24 (2d ed. 1987)).

The Utah Supreme Court has articulated several factors to consider under Rule 56(f). See Cox v. Winters, 678 P.2d 311 (Utah 1984). These include:

> 1) Were the reasons articulated in the Rule 56(f) affidavit "adequate" or is the party against whom summary judgment is sought merely on a "fishing expedition" for purely speculative facts after substantial discovery has been conducted without producing any significant evidence; 2) Was there sufficient time since the inception of the lawsuit for the party against whom the summary judgment is sought to use discovery procedures, and

> thereby cross-examine the moving party; 3) If the discovery procedures were timely initiated, was the non-moving party afforded an appropriate response?

Id. at 312-14.

This Court has recognized that the party seeking the continuance must "explain how the continuance will aid his opposition to summary judgment." Callioux, 745 P.2d at 841 (quoting Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828, 833 (10th Cir. 1986)). This explanation "must present facts in proper form . . . And the opposing party's facts must be material and of a substantial nature." Callioux, 745 P.2d at 841 (quoting 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice ¶ 56.15[3] (2d ed. 1987)). In addition, Utah courts have held that where a plaintiff's claims fail as a matter of law and where additional discovery would only seek irrelevant facts a Rule 56(f) motion should be denied. See Mast, 971 P.2d at 934; American Towers Owners Assoc. v. CCI Mechanical, Inc., 930 P.2d 1182, 1195 (Utah 1996).

On October 22, 1997, American States filed a Motion for Summary Judgment arguing that American States did not qualify under the statutes implicated by Holmes' statutory and fiduciary claims. (R. 153-55, 586). In response, on October 27, 1997, Holmes filed a Rule 56(f) Motion for Continuance. (R. 193). In the Motion, Holmes stated that:

> It is essential in order for [Holmes] to appropriately evaluate and respond to the issues raised by American's Motion that [Holmes] be permitted, prior to the preparation and submission of his

> response, to take the deposition of those individuals central to American's decision to declare the motor vehicle that is the subject of these proceedings a total loss salvage motor vehicle. It is also essential that [Holmes] be allowed to discover all of the facts and documents that underlies [sic] American's decision to declare the subject vehicle a salvage vehicle by means of such further discovery as may be indicated.

(R. 200).

However, it is important to note that American States had already provided Holmes with all such information pursuant to discovery. The parties conducted discovery for approximately nine months. American States provided Holmes with all documentation pertaining to how the loss was adjusted by American States with its insured. (R. 225-79, 306-46). American States also supplied Holmes with information on the chain of sale between American States, Intermountain Tow, Economy, and the other dealer entities. (Id.). The court reviewed the motions pertaining to this discovery and looked at the issue regarding the chain of title and the documentation showing the way in which adjusted and paid for the loss. (R. 893).

The trial court found that Holmes' motion was not well taken as the additional discovery requested by Holmes would not have further addressed the legal issues of whether American States qualified under the statutes relied upon by Holmes. (R. 586). However, despite the fact that Holmes already had more than three months to conduct additional discovery and to respond to American States' motion, the court granted Holmes an extension to March 9, 1998 to respond to the Motion for Summary Judgment.

(R. 572-574). Thus, although Holmes' Rule 56(f) Motion was denied, he still had over four-and-a-half months in which to obtain supporting affidavits and respond to American States' Motion. (R. 572-574).

Furthermore, the trial court recognized that Holmes' motion failed to establish valid reasons why additional discovery was needed to address American States' motion. (R. 200-01, 586). Holmes' conclusory request for a continuance failed to explain how the additional discovery would relate to the legal issues raised by American States' Motion for Summary Judgment. (R. 200-01, 586). Instead, Holmes' motion improperly requested additional time to discover irrelevant information relating to American States' election to 'total' the Hummer and pay its insured pursuant to its policy. (R. 200-01, 586, 893). This documentation had already been provided.

Holmes' motion is similar to the motion discussed by this Court in Callioux, where the plaintiff moved for a Rule 56(f) continuance in response to the defendant's motion for summary judgment. See Callioux, 745 P.2d at 839-40. This Court held that the plaintiffs' motion contained a "conclusory claim of need for further discovery," and that the motion was not accompanied by "reasons why they could not present 'facts essential to justify their opposition'" Id. at 841. This Court held that plaintiffs' "motion fails to articulate any material area of inquiry they intended to pursue by deposition . . . The [plaintiffs'] conclusory assertion that the scheduled depositions were 'expected to produce matter essential to resolution of the defendant's motion' smacks of a 'fishing

expedition' for purely speculative facts." Id. at 841; see Cox, 678 P.2d at 314. This Court further held that "[t]he [plaintiffs] were afforded ample time between April 26 and May 13, 1985 [17 days] in which to properly oppose the motion." Id. at 841.

In this case, where American States' Motion for Summary Judgment dealt with the *legal question* of whether the statutes implicated by Holmes' claims applied to American States, the trial court properly denied Holmes' Rule 56(f) Motion. Holmes' Motion was a conclusory request for further discovery which was irrelevant to the statutory interpretation issues presented by American States Motion for Summary Judgment. Holmes had ample time in which to conduct relevant discovery. The trial court did not abuse its discretion when it properly denied Holmes' Rule 56(f) Motion for Continuance. (R. 572-574).

CONCLUSION

The trial court correctly dismissed Holmes' causes of action. For the foregoing reasons, this Court should affirm.

DATED this 8TH day of November, 1999.

STRONG & HANNI

By Darren K. Nelson

Paul M. Belnap
Darren K. Nelson
Attorneys for Defendant/Appellee
American States Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of November, 1999, a true and correct copy of the foregoing Brief of Appellant was served by the method indicated below to the following:

Ray G. Martineau Anthony R. Martineau Attorneys for Plaintiff 3098 Highland Drive, Suite 450 Salt Lake City, Utah 84106	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile
A. W. Lauritzen Attorney for Defendant Economy Auto 610 North Main Logan, Utah 84321	(X) U.S. Mail, Postage Prepaid ( ) Hand Delivered ( ) Overnight Mail ( ) Facsimile

Darren K. Nelson

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ADDENDUM

41-3-1 to 41-3-39. Renumbered as §§ 41-3-101 to 41-3-702. 1992

PART 1

ADMINISTRATION

41-3-101. Short title.

This chapter is known as the Motor Vehicle Business Regulation Act. 1992

41-3-102. Definitions.

As used in this chapter:

(1) "Administrator" means the motor vehicle enforcement administrator.

(2) "Agent" means a person other than a holder of any dealer's or salesperson's license issued under this chapter, who for salary, commission, or compensation of any kind, negotiates in any way for the sale, purchase, order, or exchange of three or more motor vehicles for any other person in any 12-month period.

(3) "Auction" means a dealer engaged in the business of auctioning motor vehicles, either owned or consigned, to the general public.

(4) "Board" means the advisory board created in Section 41-3-106.

(5) "Body shop" means a business engaged in rebuilding, restoring, repairing, or painting primarily the body of motor vehicles damaged by collision or natural disaster.

(6) "Commission" means the State Tax Commission.

(7) "Crusher" means a person who crushes or shreds motor vehicles subject to registration under Title 41, Chapter 1a, Motor Vehicle Act, to reduce the useable materials and metals to a more compact size for recycling.

(8) (a) "Dealer" means a person:

(i) whose business in whole or in part involves selling new, used, or new and used motor vehicles; and

(ii) who sells, displays for sale, or offers for sale or exchange three or more new or used motor vehicles in any 12-month period

(b) "Dealer" includes a representative or consignee of any dealer.

(9) (a) "Dismantler" means a person engaged in the business of dismantling motor vehicles subject to registration under Title 41, Chapter 1a, Motor Vehicle Act, for the resale of parts or for salvage.

(b) "Dismantler" includes a person who dismantles three or more motor vehicles in any 12-month period.

(10) "Distributor" means a person who has a franchise from a manufacturer of motor vehicles to distribute motor vehicles within this state and who in whole or in part sells or distributes new motor vehicles to dealers or who maintains distributor representatives.

(11) "Distributor branch" means a branch office similarly maintained by a distributor for the same purposes a factory branch is maintained.

(12) "Distributor representative" means a person and each officer and employee of the person engaged as a representative of a distributor or distributor branch of motor vehicles to make or promote the sale of the distributor or the distributor branch's motor vehicles, or for supervising or contacting dealers or prospective dealers of the distributor or the distributor branch.

(13) "Division" means the Motor Vehicle Enforcement Division created in Section 41-3-104.

(14) "Factory branch" means a branch office maintained by a person who manufactures or assembles motor vehicles for sale to distributors, motor vehicle dealers, or who directs or supervises the factory branch's representatives.

(15) "Factory representative" means a person and each officer and employee of the person engaged as a representative of a manufacturer of motor vehicles or by a factory branch to make or promote the sale of the manufacturer's or factory branch's motor vehicles, or for supervising or contacting the dealers or prospective dealers of the manufacturer or the factory branch.

(16) "Franchise" means a contract or agreement between a dealer and a manufacturer of new motor vehicles or its distributor or factory branch by which the dealer is authorized to sell any specified make or makes of new motor vehicles.

(17) "Manufacturer" means a person engaged in the business of constructing or assembling new motor vehicles, ownership of which is customarily transferred by a manufacturer's statement or certificate of origin, or a person who constructs three or more new motor vehicles in any 12-month period.

(18) "Motorcycle" has the same meaning as defined in Section 41-1a-102.

(19) (a) "Motor vehicle" means a vehicle intended primarily for use and operation on the highway that is:

(i) self propelled; or

(ii) a trailer, travel trailer, or semitrailer.

(b) "Motor vehicle" does not include:

(i) mobile homes as defined in Section 41-1a-102;

(ii) trailers of 750 pounds or less unladen weight; and

(iii) farm tractors and other machines and tools used in the production, harvesting, and care of farm products.

(20) "New motor vehicle" means a motor vehicle that has never been titled or registered and has been driven less than 7,500 miles, unless the motor vehicle is a trailer, travel trailer, or semitrailer, in which case the mileage limit does not apply.

(21) "Pawnbroker" means a person whose business is to lend money on security of personal property deposited with him

(22) "Principal place of business" means a site or location in this state:

(a) devoted exclusively to the business for which the dealer, manufacturer, remanufacturer, transporter, dismantler, crusher, or body shop is licensed, and businesses incidental to them;

(b) sufficiently bounded by fence, chain, posts, or otherwise marked to definitely indicate the boundary and to admit a definite description with space adequate to permit the display of three or more new, or new and used, or used motor vehicles; and

(c) that includes a permanent enclosed building or structure large enough to accommodate the office of the establishment and to provide a safe place to keep the books and other records of the business, at which the principal portion of the business is conducted and the books and records kept and maintained.

(23) "Remanufacturer" means a person who reconstructs used motor vehicles subject to registration under Title 41, Chapter 1a, Motor Vehicle Act, to change the body style and appearance of the motor vehicle or who constructs or assembles motor vehicles from used or new and used motor vehicle parts, or who reconstructs, constructs, or assembles three or more motor vehicles in any 12-month period.

(24) "Salesperson" means an individual who for a salary, commission, or compensation of any kind, is employed either directly, indirectly, regularly, or occasionally by any new motor vehicle dealer or used motor vehicle dealer to sell, purchase, or exchange or to negotiate for the sale, purchase, or exchange of motor vehicles.

(25) "Semitrailer" has the same meaning as defined in Section 41-1a-102.

(26) "Small trailer" means a trailer that has an unladen weight of more than 750 pounds, but less than 2,000 pounds.

(27) "Special equipment" includes a truck mounted crane, cherry picker, material lift, post hole digger, and a utility or service body.

(28) "Special equipment dealer" means a new or new and used motor vehicle dealer engaged in the business of buying new incomplete motor vehicles with a gross vehicle weight of 12,000 or more pounds and installing special equipment on the incomplete motor vehicle.

(29) "Trailer" has the same meaning as defined in Section 41-1a-102.

(30) "Transporter" means a person engaged in the business of transporting motor vehicles as described in Section 41-3-202.

(31) "Travel trailer" has the same meaning as provided in Section 41-1a-102.

(32) "Used motor vehicle" means a vehicle that has been titled and registered to a purchaser other than a dealer or has been driven 7,500 or more miles, unless the vehicle is a trailer, or semitrailer, in which case the mileage limit does not apply.

(33) "Wholesale motor vehicle auction" means a dealer primarily engaged in the business of auctioning consigned motor vehicles to dealers or dismantlers who are licensed by this or any other jurisdiction

41-3-103. Exceptions to "dealer" definition — Dealer licensed in other state.

Under this chapter:

(1) (a) An insurance company, bank, finance company, public utility company, commission impound yard, federal or state governmental agency, or any political subdivision of any of them or any other person coming into possession of a motor vehicle as an incident to its regular business, that sells the motor vehicle under contractual rights that it may have in the motor vehicle is not considered a dealer.

(b) A person who sells or exchanges only those motor vehicles that he has owned for over 12 months is not considered a dealer.

(2) (a) A person engaged in leasing motor vehicles is not considered as coming into possession of the motor vehicles incident to his regular business; and

(b) a pawnbroker engaged in selling, exchanging, or pawning motor vehicles is not considered as coming into possession of the motor vehicles incident to his regular business.

(3) A person currently licensed as a dealer or salesperson by another state or country and not currently under license suspension or revocation by the administrator may only sell motor vehicles in this state to licensed dealers, dismantlers, or manufacturers, and only at their places of business. 1992

41-3-104. Division creation — Administrator appointed.

(1) There is created within the commission the Motor Vehicle Enforcement Division with the powers and duties provided in this chapter.

(2) The division shall be administered by the motor vehicle enforcement administrator.

(3) The administrator shall be appointed by the commission and is subject to the commission's supervision and direction 1992

41-3-105. Administrator's powers and duties — Administrator and investigators to be law enforcement officers.

(1) The administrator may make rules to carry out the purposes of this chapter and Sections 41-1a-1001 through 41-1a-1007 according to the procedures and requirements of Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

(2) (a) The administrator may employ clerks, deputies, and assistants necessary to discharge the duties under this chapter and may designate the duties of those clerks, deputies, and assistants.

(b) The administrator, assistant administrator, and all investigators shall be law enforcement officers certified by peace officer standards and training as required by Section 53-13-103.

(3) (a) The administrator may investigate any suspected or alleged violation of:

(i) this chapter;

(ii) Title 41, Chapter 1a, Motor Vehicle Act;

(iii) any law concerning motor vehicle fraud; or

(iv) any rule made by the administrator.

(b) The administrator may bring an action in the name of the state against any person to enjoin a violation found under Subsection (3)(a).

(4) (a) The administrator may prescribe forms to be used for applications for licenses.

(b) The administrator may require information from the applicant concerning the applicant's fitness to be licensed.

(c) Each application for a license shall contain:

(i) if the applicant is an individual, the name and residence address of the applicant and the trade name, if any, under which he intends to conduct business;

(ii) if the applicant is a partnership, the name and residence address of each partner, whether limited or general, and the name under which the partnership business will be conducted;

(iii) if the applicant is a corporation, the name of the corporation, and the name and residence address of each of its principal officers and directors;

(iv) a complete description of the principal place of business, including:

(A) the municipality, with the street and number, if any;

(B) if located outside of any municipality, a general description so that the location can be determined; and

(C) any other places of business operated and maintained by the applicant in conjunction with the principal place of business; and

(v) if the application is for a new motor vehicle dealer's license, the name of each motor vehicle the applicant has been enfranchised to sell or exchange, the name and address of the manufacturer or distributor who has enfranchised the applicant, and the names and addresses of the individuals who will act as salespersons under authority of the license.

(5) The administrator may adopt a seal with the words Motor Vehicle Enforcement Administrator, State of Utah", to authenticate the acts of his office.

(6) (a) The administrator may require that the licensee erect or post signs or devices on his principal place of business and any other sites, equipment, or locations operated and maintained by the licensee in conjunction with his business.

(b) The signs or devices shall state the licensee's name, principal place of business, type and number of licenses, and any other information that the administrator considers necessary to identify the licensee.

(c) The administrator may make rules in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, determining allowable size and shape of signs or devices, their lettering and other details, and their location.

(7) (a) The administrator shall provide for quarterly meetings of the advisory board and may call special meetings.

(b) Notices of all meetings shall be mailed to each member at his last-known address not fewer than five days prior to the meeting.

(8) The administrator, the officers and inspectors of the division designated by the commission, and peace officers shall:

(a) make arrests upon view and without warrant for any violation committed in their presence of any of the provisions of this chapter, or Title 41, Chapter 1a, Motor Vehicle Act;

(b) when on duty, upon reasonable belief that a motor vehicle, trailer, or semitrailer is being operated in violation of any provision of Title 41, Chapter 1a, Motor Vehicle Act, require the driver of the vehicle to stop, exhibit his driver's license and the registration card issued for the vehicle and submit to an inspection of the vehicle, the license plates, and registration card;

(c) serve all warrants relating to the enforcement of the laws regulating the operation of motor vehicles, trailers, and semitrailers;

(d) investigate traffic accidents and secure testimony of witnesses or persons involved; and

(e) investigate reported thefts of motor vehicles, trailers, and semitrailers. 1998

41-3-106. Board — Creation and composition — Appointment, terms, compensation, and expenses of members — Meetings — Quorum — Powers and duties — Officers' election and duties — Voting.

(1) (a) There is created an advisory board of five members that shall assist and advise the administrator in the administration and enforcement of this chapter.

(b) The members shall be appointed by the governor from among the licensed motor vehicle manufacturers, distributors, factory branch and distributor branch representatives, dealers, dismantlers, transporters, remanufacturers, and body shops.

(c) (i) Except as required by Subsection (ii), each member shall be appointed for a term of four years or until his successor is appointed and qualified.

(ii) Notwithstanding the requirements of Subsection (i), the governor shall, at the time of appointment or reappointment, adjust the length of terms to ensure that the terms of board members are staggered so that approximately half of the board is appointed every two years.

(d) Three members of the board shall be selected as follows:

(i) one from new motor vehicle dealers;

(ii) one from used motor vehicle dealers; and

(iii) one from manufacturers, transporters, dismantlers, crushers, remanufacturers, and body shops.

(e) (i) Members shall receive no compensation or benefits for their services, but may receive per diem and expenses incurred in the performance of the member's official duties at the rates established by the Division of Finance under Sections 63A-3-106 and 63A-3-107.

(ii) Members may decline to receive per diem and expenses for their service.

(f) A majority of the members of the board constitutes a quorum and may act upon and resolve in the name of the board any matter, thing, or question referred to it by the administrator, or that the board has power to determine.

(g) When a vacancy occurs in the membership for any reason, the replacement shall be appointed for the unexpired term.

(2) (a) The board shall on the first day of each July, or as soon thereafter as practicable, elect a chair, vice chair, secretary, and assistant secretary from among its members, who shall each hold office until his successor is elected.

(b) As soon as the board elects its officers, the elected secretary shall certify the results of the election to the administrator.

(c) The chair shall preside at all meetings of the board and the secretary shall make a record of the proceedings, which shall be preserved in the office of the administrator.

(d) If the chair is absent from any meeting of the board, his duties shall be discharged by the vice chair, and if the secretary is absent, his duties shall be discharged by the assistant secretary.

(e) All members of the board may vote on any question, matter, or thing that properly comes before it. 1996

41-3-107. Attorney general — Duty to render opinions and to represent or appear for administrator or board.

The attorney general shall:

(1) represent the administrator, the division, and the board;

(2) give opinions on all questions of law relating to the interpretation of this chapter or arising out of the administration of this chapter; and

(3) appear on behalf of the administrator, the division, or the board in all actions brought by or against the administrator, the division, or board, whether under the provisions of this chapter or otherwise. 1992

41-3-108. Copies of records and papers — Admissibility in evidence.

Certified copies of all records and papers prepared in the office of the administrator under seal of the administrator are admissible in evidence in any case in the same manner as the original. 1993

41-3-109. Adjudicative proceedings — Hearings.

(1) The commission, the division, the board, and the administrator shall comply with the procedures and requirements of Title 63, Chapter 46b, Administrative Procedures Act, in all adjudicative proceedings conducted under the authority of this chapter and Sections 41-1a-1001 through 41-1a-1008.

(2) The administrator may request the attendance of the board at any hearing, or he may direct that any hearing be held before the board. 1992

PART 2

LICENSING

41-3-201. Licenses required — Restitution — Education.

(1) As used in this section, "new applicant" means a person who is applying for a license that the person has not been issued during the previous licensing year.

(2) A person may not act as any of the following without having procured a license issued by the administrator: a dealer, salesperson, manufacturer, transporter, dismantler, distributor, factory branch and representative, distributor branch and representative, crusher, remanufacturer, and body shop.

(3) A supplemental license shall be secured by a dealer, manufacturer, remanufacturer, transporter, dismantler, crusher, or body shop for each additional place of business maintained by him.

(4) A person who has been convicted of any law relating to motor vehicle commerce or motor vehicle fraud may not be issued a license unless full restitution regarding those convictions has been made.

(5) (a) Beginning July 1, 1999, the division may not issue a license to a new applicant for a new or used motor vehicle dealer license unless the new applicant completes an eight-hour orientation class approved by the division that includes education on motor vehicle laws and rules.

(b) The approved costs of the orientation class shall be paid by the new applicant.

(c) The class shall be completed by the new applicant and the applicant's partners, corporate officers, bond indemnitors, and managers.

(d) The division shall approve:

(i) providers of the orientation class; and

(ii) costs of the orientation class. 1999

41-3-201.5. Brokering of a new motor vehicle without a license prohibited.

(1) A person, may not, for a fee, commission, or other form of compensation, arrange, offer to arrange, or broker a transaction involving the sale or lease of more than two new motor vehicles in any 12 consecutive month period, unless the person is licensed under Subsection 41-3-202(1).

(2) A person who violates this section is guilty of a class B misdemeanor. 1997

41-3-202. Licenses — Classes and scope.

(1) A new motor vehicle dealer's license permits the licensee to:

(a) offer for sale, sell, or exchange new motor vehicles if the licensee possesses a franchise from the manufacturer of the motor vehicle offered for sale, sold, or exchanged by the licensee;

(b) offer for sale, sell, or exchange used motor vehicles;

(c) operate as a body shop; and

(d) dismantle motor vehicles.

(2) A used motor vehicle dealer's license permits the licensee to:

(a) offer for sale, sell, or exchange used motor vehicles;

(b) operate as a body shop; and

(c) dismantle motor vehicles.

(3) A new motorcycle and small trailer dealer's license permits the licensee to:

(a) offer for sale, sell, or exchange new motorcycles or small trailers if the licensee possesses a franchise from the manufacturer of the motorcycle or small trailer offered for sale, sold, or exchanged by the licensee;

(b) offer for sale, sell, or exchange used motorcycles or small trailers; and

(c) dismantle motorcycles or small trailers.

(4) A used motorcycle and small trailer dealer's license permits the licensee to:

(a) offer for sale, sell, or exchange used motorcycles and small trailers; and

(b) dismantle motorcycles or small trailers.

(5) A salesperson's license permits the licensee to act as a motor vehicle salesperson and is valid for employment with only one dealer at a time.

(6) (a) A manufacturer's license permits the licensee to construct or assemble motor vehicles subject to registration under Title 41, Chapter 1a, Motor Vehicle Act, at an established place of business and to remanufacture motor vehicles.

(b) Under rules of the division the licensee may issue and install vehicle identification numbers on manufactured motor vehicles.

(c) The licensee may franchise and appoint dealers to sell manufactured motor vehicles by notifying the division of the franchise or appointment.

(7) A transporter's license permits the licensee to transport or deliver motor vehicles subject to registration under Title 41, Chapter 1a, Motor Vehicle Act from a manufacturing, assembling, or distributing point or from a dealer, to dealers, distributors, or sales agents of a manufacturer or remanufacturer, to or from detail or repair shops, and to financial institutions or places of storage from points of repossession.

(8) A dismantler's license permits the licensee to dismantle motor vehicles subject to registration under Title 41, Chapter 1a, Motor Vehicle Act, for the purpose of reselling parts or for salvage, or selling dismantled or salvage vehicles to a crusher or other dismantler.

(9) A distributor or factory branch and distributor branch's license permits the licensee to sell and distribute new motor vehicles, parts, and accessories to their franchised dealers.

(10) A representative's license, for factory representatives or distributor representatives permits the licensee to contact his authorized dealers for the purpose of making or promoting the sale of motor vehicles, parts, and accessories.

(11) (a) (i) A remanufacturer's license permits the licensee to construct, reconstruct, assemble, or reassemble motor vehicles subject to registration under Title 41, Chapter 1a, Motor Vehicle Act, from used or new motor vehicles or parts.

(ii) Evidence of ownership of parts and motor vehicles used in remanufacture shall be available to the division upon demand.

(b) Under rules of the administrator, the licensee may issue and install vehicle identification numbers on remanufactured motor vehicles.

(12) A crusher's license permits the licensee to engage in the business of crushing or shredding motor vehicles subject to registration under Title 41, Chapter 1a, Motor Vehicle Act, for the purpose of reducing the useable materials and metals to a more compact size for recycling.

(13) A body shop's license permits the licensee to rebuild, restore, repair, or paint primarily the body of motor vehicles damaged by collision or natural disaster, and to dismantle motor vehicles.

(14) A special equipment dealer's license permits the licensee to:

(a) buy incomplete new motor vehicles with a gross vehicle weight of 12,000 or more pounds from a new motor vehicle dealer and sell the new vehicle with the special equipment installed without a franchise from the manufacturer;

(b) offer for sale, sell, or exchange used motor vehicles;

(c) operate as a body shop; and

(d) dismantle motor vehicles. 1998

41-3-203. Licenses — Form — Seal — Custody of salesperson's license — Display of salesperson and dealer licenses — Licensee's pocket card.

(1) (a) The administrator shall prescribe the form of each license and the seal of his office shall be imprinted on each license.

(b) The license of each salesperson shall be delivered or mailed to the dealer employing the salesperson and it shall be kept in the custody and control of the dealer and conspicuously displayed in the dealer's place of business.

(c) Each licensee shall display conspicuously his own license in his place of business.

(2) (a) The administrator shall prepare and deliver a pocket card, certifying that the person whose name is on the card is licensed under this chapter.

(b) Each salesperson's card shall also contain the name and address of the dealer employing him.

(c) Each salesperson shall on request display his pocket card. 1992

41-3-204. Licenses — Principal place of business as prerequisite — Change of location — Relinquishment on loss of principal place of business.

(1) (a) The following licensees must maintain a principal place of business: dealers, special equipment dealers, manufacturers, transporters, remanufacturers, dismantlers, crushers, and body shops.

(b) The administrator may not issue a license under Subsection (1)(a) to an applicant who does not have a principal place of business.

(c) If a licensee changes the location of his principal place of business, he shall immediately notify the administrator and a new license shall be granted for the unexpired portion of the term of the original license at no additional fee.

(2) (a) If a licensee loses possession of a principal place of business, the license is automatically suspended and he shall immediately notify the administrator and upon demand by the administrator deliver the license, pocket cards, special plates, and temporary permits to the administrator.

Part 7

Remedies

Part 8

Assistive Technology Warranty Act

PART 1

SHORT TITLE, GENERAL CONSTRUCTION AND SUBJECT MATTER

70A-2-101. Short title.

This chapter shall be known and may be cited as Uniform Commercial Code — Sales. 1965

70A-2-102. Scope — Certain security and other transactions excluded from this chapter.

Unless the context otherwise requires, this chapter applies to transactions in goods; it does not apply to any transaction which although in the form of an unconditional contract to sell or present sale is intended to operate only as a security transaction nor does this chapter impair or repeal any statute regulating sales to consumers, farmers or other specified classes of buyers. 1965

70A-2-103. Definitions and index of definitions.

(1) In this chapter unless the context otherwise requires:

(a) "Buyer" means a person who buys or contracts to buy goods

(b) "Good faith" in the case of a merchant means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

(c) "Receipt" of goods means taking physical possession of them.

(d) "Seller" means a person who sells or contracts to sell goods.

(2) Other definitions applying to this chapter or to specified parts thereof, and the sections in which they appear are:

"Acceptance." Section 70A-2-606.
"Banker's credit." Section 70A-2-325.
"Between merchants." Section 70A-2-104.
"Cancellation." Subsection 70A-2-106(4).
"Commercial unit." Section 70A-2-105.
"Confirmed credit." Section 70A-2-325.
"Conforming to contract." Section 70A-2-106.
"Contract for sale." Section 70A-2-106.
"Cover." Section 70A-2-712.
"Entrusting." Section 70A-2-403.
"Financing agency." Section 70A-2-104.
"Future goods." Section 70A-2-105.
"Goods." Section 70A-2-105.
"Identification." Section 70A-2-501.
"Installment contract." Section 70A-2-612.
"Letter of Credit." Section 70A-2-325.
"Lot." Section 70A-2-105.
"Merchant." Section 70A-2-104.
"Overseas." Section 70A-2-323.
"Person in position of seller." Section 70A-2-707.
"Present sale." Section 70A-2-106.
"Sale." Section 70A-2-106.
"Sale on approval." Section 70A-2-326.
"Sale or return." Section 70A-2-326.
"Termination." Section 70A-2-106

(3) The following definitions in other chapters apply to this chapter:

"Check." Section 70A-3-104.
"Consignee." Section 70A-7-102.
"Consignor." Section 70A-7-102.
"Consumer goods." Section 70A-9-109.
"Dishonor." Section 70A-3-502.
"Draft." Section 70A-3-104.

(4) In addition Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter 1997

70A-2-104. Definitions — "Merchant" — "Between merchants" — "Financing agency."

(1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.

(2) "Financing agency" means a bank, finance company or other person who in the ordinary course of business makes advances against goods or documents of title or who by arrangement with either the seller or the buyer intervenes in ordinary course to make or collect payment due or claimed under the contract for sale, as by purchasing or paying the seller's draft or making advances against it or by merely taking it for collection whether or not documents of title accompany the draft. "Financing agency" includes also a bank or other person who similarly intervenes between persons who are in the position of seller and buyer in respect to the goods (Section 70A-2-707).

(3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants. 1965

70A-2-105. Definitions — Transferability — "Goods" — "Future" goods — "Lot" — "Commercial unit."

(1) "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (chapter 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty (Section 70A-2-107).

(2) Goods must be both existing and identified before any interest in them can pass. Goods which are not both existing and identified are "future" goods. A purported present sale of future goods or of any interest therein operates as a contract to sell.

(3) There may be a sale of a part interest in existing identified goods.

(4) An undivided share in an identified bulk of fungible goods is sufficiently identified to be sold although the quantity of the bulk is not determined. Any agreed proportion of such a bulk or any quantity thereof agreed upon by number, weight or other measure may to the extent of the seller's interest in the bulk be sold to the buyer who then becomes an owner in common.

(5) "Lot" means a parcel or a single article which is the subject matter of a separate sale or delivery, whether or not it is sufficient to perform the contract.

(6) "Commercial unit" means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole. 1965

70A-2-106. Definitions — "Contract" — "Agreement" — "Contract for sale" — "Sale" — "Present sale" — "Conforming" to contract — "Termination" — "Cancellation."

(1) In this chapter unless the context otherwise requires "contract" and "agreement" are limited to those relating to the present or future sale of goods. "Contract for sale" includes both a present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a price (Section 70A-2-401). A "present sale" means a sale which is accomplished by the making of the contract.

(2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

(3) "Termination" occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach. On "termination" all obligations which are still executory on both sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance. 1965

70A-2-107. Goods to be severed from realty — Recording.

(1) A contract for the sale of minerals or the like (including oil or gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this chapter if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interest in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in Subsection (1) or of timber to be cut is a contract for the sale of goods within this chapter whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

(3) The provisions of this section are subject to any third-party rights provided by the law relating to realty records, and the contract for sale may be executed and recorded as a document transferring an interest in land and shall then constitute notice to third parties of the buyer's rights under the contract for sale. 1977

PART 2

FORM, FORMATION AND READJUSTMENT OF CONTRACT

70A-2-201. Formal requirements — Statute of frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of Subsection (1) against such party unless written notice of objection to its contents is given within ten days after it is received.

(3) A contract which does not satisfy the requirements of Subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (Section 70A-2-513); and

(c) if delivery is authorized and made by way of documents of title otherwise than by Subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period. 1965

70A-2-311. Options and cooperation respecting performance.

(1) An agreement for sale which is otherwise sufficiently definite (Subsection (3) of Section 70A-2-204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in Subsections (1)(c) and (3) of Section 70A-2-319 specifications or arrangements relating to shipment are at the seller's option.

(3) Where such specification would materially affect the other party's performance but is not seasonably made or where one party's cooperation is necessary to the agreed performance of the other but is not seasonably forthcoming, the other party in addition to all other remedies

(a) is excused for any resulting delay in his own performance; and

(b) may also either proceed to perform in any reasonable manner or after the time for a material part of his own performance treat the failure to specify or to cooperate as a breach by failure to deliver or accept the goods. 1965

70A-2-312. Warranty of title and against infringement — Buyer's obligation against infringement.

(1) Subject to Subsection (2) there is in a contract for sale a warranty by the seller that

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge.

(2) A warranty under Subsection (1) will be excluded or modified only by specific language or by circumstances which give the buyer reason to know that the person selling does not claim title in himself or that he is purporting to sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing in goods of the kind warrants that the goods shall be delivered free of the rightful claim of any third person by way of infringement or the like but a buyer who furnishes specifications to the seller must hold the seller harmless against any such claim which arises out of compliance with the specifications. 1965

70A-2-313. Express warranties by affirmation, promise, description, sample.

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

(c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty. 1965

70A-2-314. Implied warranty — Merchantability — Usage of trade.

(1) Unless excluded or modified (Section 70A-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 70A-2-316) other implied warranties may arise from course of dealing or usage of trade. 1965

70A-2-315. Implied warranty — Fitness for particular purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose. 1965

70A-2-316. Exclusion or modification of warranties — Livestock.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (Section 70A-2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to Subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

tatement shall be signed and certified as to its truthfulness y the transferor, stating:

(a) the date of transfer;

(b) the transferor's name and address;

(c) the transferee's name and address;

(d) the identity of the motor vehicle, including its make, model, year, body type, and identification number;

(e) the odometer reading at the time of transfer, not including tenths of miles or tenths of kilometers;

(f) (i) that to the best of the transferor's knowledge, the odometer reading reflects the amount of miles or kilometers the motor vehicle has actually been driven;

(ii) that the odometer reading reflects the amount of miles or kilometers in excess of the designed mechanical odometer limit; or

(iii) that the odometer reading is not the actual amount of miles or kilometers; and

(g) a warning to alert the transferee if a discrepancy exists between the odometer reading and the actual mileage.

(3) (a) Each transferee of a motor vehicle shall acknowledge receipt of the odometer disclosure statement required by Subsection (2) by signing it, and the transferor shall deliver to the transferee the original odometer disclosure statement Both the transferor and the transferee shall retain a legible copy of the odometer disclosure statement for not less than four years.

(b) A dealer who is required under Section 41-3-301 to title and register a motor vehicle sold to a customer shall surrender the original odometer disclosure statement to the division and deliver a copy to the transferee.

(4) Notwithstanding the requirements of this section, the dometer mileage need not be disclosed by a transferor of:

(a) a single motor vehicle having a manufacturer specified gross laden weight rating of more than 16,000 pounds, or a motor vehicle registered in this state for a gross laden weight of 18,000 pounds or more;

(b) a motor vehicle that is ten years old or older;

(c) a motor vehicle sold directly by the manufacturer to any agency of the United States in conformity with contractual specifications; or

(d) a new motor vehicle prior to its first transfer for purposes other than resale.

(5) If the motor vehicle has not been titled or if the certificate of title does not contain a space for the information equired, the written disclosure shall be executed as a separate document.

(6) A person may not sign an odometer disclosure statement s both the transferor and the transferee in the same transction. 1992

1-1a-903. Leased motor vehicles — Disclosure of odometer information.

(1) (a) Before executing any transfer of ownership document, each lessor of a leased motor vehicle shall notify the lessee in writing that the lessee is required to provide a written disclosure to the lessor regarding the mileage.

(b) This notice shall state that failure to complete or providing false information may result in fines, imprisonment, or both.

(2) (a) In connection with the transfer of ownership of the leased motor vehicle, the lessee shall furnish to the lessor a written statement regarding the mileage of the motor vehicle.

(b) This statement must be signed by the lessee and shall contain all of the information required by Section 41-1a-902 and in addition the name and address of the lessee and the lessor.

(c) The statement shall be signed and certified as to its truthfulness by the lessee 1992

41-1a-904. Retention of statements by dealers — Inspection.

(1) Each dealer required to execute and furnish an odometer mileage disclosure statement under Section 41-1a-902 shall retain at its primary place of business for four years after each transfer of a motor vehicle each statement that he receives and a legible copy of each statement that he issues in connection with those transfers.

(2) These statements shall be available for inspection by, and copies shall be furnished to, any peace officer during reasonable business hours. 1992

41-1a-905. Division to print mileage on certificate of title — Exceptions — Owner to record mileage on application.

(1) The division, before accepting an application for transfer of ownership of a motor vehicle under Part 7, Transfer of Ownership, shall require the transferee to furnish the completed odometer disclosure statement required by Section 41-1a-902 and shall, upon the transfer of ownership, print the mileage on the new certificate of title.

(2) This section does not apply to motor vehicles exempted from mileage disclosure statements under Section 41-1a-902

(3) The division, before accepting any application for renewal of registration of a motor vehicle, shall require the owner to record the actual miles on the application. 1992

41-1a-906. Repair or replacement of odometer — Notice affixed to motor vehicle.

(1) Sections 41-1a-902 through 41-1a-905 do not prevent the repair or replacement of an odometer, provided the mileage indicated on the odometer remains the same as before the repair or replacement.

(2) Where the odometer is incapable of registering the same mileage as before the repair or replacement, the odometer shall be adjusted to zero and a notice in writing shall be affixed by the owner to the left door frame of the motor vehicle specifying the mileage prior to repair or replacement of the odometer and the date it was repaired or replaced. 1992

PART 10

SALVAGE VEHICLES — JUNK AND DISMANTLED VEHICLES

41-1a-1001. Definitions.

As used in Sections 41-1a-1001 through 41-1a-1008:

(1) "Certified vehicle inspector" means a person employed by the Motor Vehicle Enforcement Division as qualified through experience, training, or both to identify and analyze damage to vehicles with either unibody or conventional frames.

(2) "Major component part" means:

(a) the front body component of a motor vehicle consisting of the structure forward of the firewall;

(b) the passenger body component of a motor vehicle including the firewall, roof, and extending to and including the rear-most seating;

(c) the rear body component of a motor vehicle consisting of the main cross member directly behind the rear-most seating excluding any auxiliary seating and structural body assembly rear of the cross members; and

(d) the frame of a motor vehicle consisting of the structural member that supports the auto body.

(3) (a) "Major damage" means damage to a major component part of the motor vehicle requiring ten or more hours to repair or replace, as determined by a

collision estimating guide recognized by the Motor Vehicle Enforcement Division.

(b) For purposes of Subsection (a) repair or replacement hours do not include time spent on cosmetic repairs.

(4) "Owner" means the person who has the legal right to possession of the vehicle.

(5) (a) "Salvage certificate" means a certificate of ownership issued for a salvage vehicle before a new certificate of title is issued for the vehicle.

(b) A salvage certificate is not valid for registration purposes.

(6) "Salvage vehicle" means any vehicle:

(a) damaged by collision, flood, or other occurrence to the extent that the cost of repairing the vehicle for safe operation exceeds its fair market value; or

(b) that has been declared a salvage vehicle by an insurer or other state or jurisdiction, but is not precluded from further registration and titling.

(7) "Unbranded title" means a certificate of title for a previously damaged motor vehicle without any designation that the motor vehicle has been damaged.

(8) "Vehicle damage disclosure statement" means the form designed and furnished by the Motor Vehicle Enforcement Division for a damaged motor vehicle inspection under Section 41-1a-1002. 1994

41-1a-1002. Unbranded title — Prerepair inspections — Interim repair inspections — Repair.

(1) To obtain an unbranded title to a salvage vehicle:

(a) the vehicle must:

(i) be a motor vehicle;

(ii) (A) have an unbranded Utah title or a Utah salvage certificate issued to replace an unbranded Utah title at the time the motor vehicle is inspected under Subsection (iii); or

(B) have an unbranded title from another jurisdiction and the motor vehicle shall have been damaged in Utah as evidenced by an accident report;

(iii) be inspected by a certified vehicle inspector prior to any repairs on the motor vehicle following any major damage; and

(iv) have major damage in no more than one major component part;

(b) the major damage identified by a certified vehicle inspector under Subsection (a) must be repaired in accordance with standards established by the Motor Vehicle Enforcement Division;

(c) any interim inspection required by a certified vehicle inspector must be completed in accordance with the directions of the initial certified vehicle inspector and to the satisfaction of the interim certified vehicle inspector; and

(d) the owner must apply to the Motor Vehicle Enforcement Division for authorization to obtain an unbranded title under Section 41-1a-1003.

(2) A flood damaged motor vehicle does not qualify for an unbranded title.

(3) A salvage vehicle that is seven years old or older at the time of application for unbranding does not qualify for an unbranded title.

(4) The prerepair motor vehicle inspection required under Subsection (1) shall include examination of the motor vehicle and its major component parts to determine:

(a) the extent and location of the major damage to the motor vehicle;

(b) that the identification numbers of the vehicle or its parts have not been removed, falsified, altered, defaced, or destroyed; and

(c) there are no indications that the vehicle or any of its parts are stolen.

(5) If the certified vehicle inspector determines in an inspection under Subsection (1) that the motor vehicle has major damage:

(a) in more than one major component part, the certified vehicle inspector shall notify the Motor Vehicle Enforcement Division and the owner that the motor vehicle does not qualify for an unbranded title; or

(b) requiring repair or replacement in one or no major component part he shall:

(i) record on the vehicle damage disclosure statement the·

(A) date of the inspection;

(B) description of the motor vehicle including its vehicle identification number, make, model, and year of manufacture;

(C) owner of the motor vehicle and name of the lienholder, if any, shown on the salvage certificate; and

(D) major damage to the motor vehicle requiring repair or replacement;

(ii) indicate that the motor vehicle may qualify for an unbranded title if the major damage is repaired or the damaged part is replaced;

(iii) sign the vehicle damage disclosure statement and attest to the information's accuracy;

(iv) indicate whether an interim inspection of the motor vehicle damage repairs is required and which repairs require inspection prior to completion of repair work;

(v) give to the owner a copy of the vehicle damage disclosure statement and deliver or mail a copy of the statement to the lienholder, if any, shown on the salvage certificate; and

(vi) file the original vehicle damage disclosure statement with the Motor Vehicle Enforcement Division.

(6) (a) Upon receipt by the Motor Vehicle Enforcement Division of notification from a certified vehicle inspector that a motor vehicle has had a prerepair inspection, the Motor Vehicle Enforcement Division shall make a record of the inspection.

(b) Any subsequent prerepair inspections shall be disregarded by the Motor Vehicle Enforcement Division in evaluating the major damage to the motor vehicle and the repairs required.

(7) A person who repairs or replaces major damage identified by a certified vehicle inspector on a motor vehicle in accordance with Subsection (1) shall:

(a) record on the vehicle damage disclosure statement:

(i) a description of the repairs made to the motor vehicle including how they were made; and

(ii) his signature following the repair description with an attestation that the description is accurate;

(b) obtain the signature of the certified vehicle inspector who performs an interim inspection, attesting that the repairs identified for interim inspection were satisfactorily completed;

(c) file the original vehicle damage disclosure statement containing the repair information with the Motor Vehicle Enforcement Division; and

(d) give a copy of the vehicle damage disclosure statement to the owner. 1994

41-1a-1003. Unbranded certificate of title — Application.

(1) If the certified vehicle inspector determines under Section 41-1a-1002 that a motor vehicle may qualify for an unbranded title, following repair or replacement of the dam-

aged major component part of the vehicle identified by the certified vehicle inspector the owner may submit an application to the Motor Vehicle Enforcement Division for issuance of an unbranded title

(2) The applicant for an unbranded title shall submit to the Motor Vehicle Enforcement Division an application together with the vehicle damage disclosure statement and other supporting documents required by the Motor Vehicle Enforcement Division

(3) The Motor Vehicle Enforcement Division shall make an independent determination based on the vehicle damage disclosure statement and other relevant documents whether the motor vehicle is qualified to receive an unbranded title 1991

41-1a-1004. Certificate of title — Salvage vehicles.

(1) If the division is able to ascertain the fact, at the time application is made for initial registration or transfer of ownership of a salvage vehicle, the title shall be branded

(a) rebuilt and restored to operation,

(b) in a flood and restored to operation, or

(c) not restored to operation

(2) Before the sale of a vehicle for which a salvage certificate or branded title has been issued the seller shall provide the prospective purchaser with written notification that a salvage certificate or a branded title has been issued for the vehicle 1992

41-1a-1005. Salvage vehicle — Declaration by insurance company — Surrender of title — Salvage certificate of title.

(1) (a) (i) If an insurance company declares a vehicle a salvage vehicle and takes possession of the vehicle for disposal, or an insurance company pays off the owner of a vehicle that is stolen and not recovered, the insurance company shall within ten days from the settlement of the loss surrender to the division the outstanding certificate of title, properly endorsed, or other evidence of ownership acceptable to the division

(ii) The division shall then issue a salvage certificate in the insurance company's name

(b) (i) If the owner of a salvage vehicle retains possession of the vehicle, the insurance company shall within ten days from the settlement of the loss notify the division of the retention on a form prescribed by the division

(ii) The insurance company shall notify the owner of the vehicle of his responsibility to comply with this section

(iii) The owner shall within ten days from the settlement of the loss surrender to the division the properly endorsed certificate of title or other evidence of ownership acceptable to the division

(iv) The division shall then issue a salvage certificate in the owner's name

(c) (i) When a salvage vehicle is not the subject of an insurance settlement, a self insurer or an owner who is uninsured shall within ten days of the theft or major damage surrender to the division the properly endorsed certificate of title or other evidence of ownership acceptable to the division

(ii) The division shall then issue a salvage certificate in the owner's name

(d) (i) If a dealer licensed under Title 41 Chapter 3, Part 2, Licensing takes possession of any salvage vehicle for which there is not already issued a branded title or salvage certificate from the division or another jurisdiction, the dealer shall within ten days surrender to the division the certificate of title or other evidence of ownership acceptable to the division

(ii) The division shall then issue a salvage certificate in the applicant's name

(2) Any person, insurance company or dealer licensed under Title 41, Chapter 3 Part 2, Licensing who fails to obtain a salvage certificate as required in this section or who sells a salvage vehicle without first obtaining a salvage certificate is guilty of a class B misdemeanor

(3) This section does not apply to a vehicle

(a) that has an undamaged, wholesale value of $2,000 or less, or

(b) if a salvage certificate has been issued by another state or jurisdiction for the salvage vehicle

(4) Upon sale or disposal of a salvage vehicle, the seller shall deliver to the purchaser the properly endorsed salvage certificate within 48 hours as required in Section 41 1a 1310, or if the seller is a dealer licensed under Title 41, Chapter 3, Part 2, Licensing, the dealer shall comply with Section 41 3 301

(5) Except as provided in Subsection (1) this chapter does not apply to a motor vehicle that has been stolen or taken without the consent of the owner until the motor vehicle has been recovered, and then it applies only if the motor vehicle is a salvage vehicle 1992

41-1a-1006. Vehicle damaged out-of-state — Division to make a record.

(1) If a vehicle that is titled in this state is damaged in another state or jurisdiction but would require a salvage certificate in this state and the vehicle is not returned to the state the owner of the vehicle must notify the purchaser and the division that if the vehicle is subsequently titled in Utah the certificate of title will be branded as a salvage vehicle

(2) The division shall make a record of the damage 1992

41-1a-1007. Fees.

(1) A certified vehicle inspector may charge a fee in accordance with Section 63 38 3 2 for each inspection under Subsection 41 1a 1002(1)

(2) To cover the costs of inspection and to defray the cost of certification, the fee charged under this section by a certified vehicle inspector shall be retained by the Motor Vehicle Enforcement Division as a dedicated credit 1995

41-1a-1008. Criminal penalty for violation.

It is a class A misdemeanor to knowingly violate Sections 41 1a-1001 through 41 1a 1007, unless another penalty is specifically provided 1992

41-1a-1009. Abandoned and inoperable vehicles, vessels, and outboard motors — Determination by commission — Disposal of vehicles.

(1) A vehicle, vessel, or outboard motor is abandoned and inoperable when

(a) the vehicle vessel or outboard motor has been inspected by an authorized investigator or agent appointed by the commission and

(b) the authorized investigator or agent has made a written determination that the vehicle, vessel, or outboard motor cannot be rebuilt or reconstructed in a manner that allows its use as designed by the manufacturer

(2) (a) Before issuing a written determination under Subsection (1), a signed statement is required from the purchaser of the vehicle, vessel, or outboard motor for salvage, identifying the vehicle vessel, or outboard motor by identification number and certifying that the inoperable vehicle vessel or outboard motor will not be rebuilt, reconstructed or in any manner allowed to operate as designed by the manufacturer

thereafter, but no later than 72 hours prior to the execution of the contract, it provides to the proprietor, in writing, a schedule of the rates and terms of royalties under the contract, including:

(1) any sliding scale, discounts, or reductions in fees on any basis for which the proprietor may be eligible; and

(2) any scheduled increases or decreases in fees during the term of the contract. 1998

13-10a-5. Contract requirements.

(1) Beginning July 1, 1998, each contract for the payment of royalties between a proprietor and a performing rights society or organization executed, issued, or renewed in the state shall:

(a) be in writing;

(b) be signed by both parties to the contract; and

(c) include at least the following information:

(i) the proprietor's name and business address and the name and location of each place of business to which the contract applies;

(ii) the name and business address of the performing rights society or organization;

(iii) the duration of the contract; and

(iv) the schedule of rates and terms of royalties to be collected under the contract, including any sliding scale, discount, or schedule for any increase or decrease of those rates for the duration of the contract.

(2) (a) Nothing in this act shall be construed to affect any contract signed before July 1, 1998.

(b) All contracts signed before July 1, 1998, that are renewed after that date are subject to the requirements of this act. 1998

13-10a-6. Jurisdiction of court action.

An action may be brought or a counterclaim may be asserted in a court of competent jurisdiction against a performing rights society to enjoin a violation of this act and to recover actual damages sustained as a result of that violation. 1998

13-10a-7. Provisions of chapter not exclusive.

The remedies, duties, and prohibitions of this chapter are not exclusive and are in addition to all other causes of actions, remedies, and penalties provided by law. 1998

13-10a-8. Exemptions.

(1) This act does not apply to contracts between performing rights societies or organizations and broadcasters licensed by the Federal Communications Commission, unless any such society is licensed by the Federal Communications Commission.

(2) This act does not apply to investigations by law enforcement agencies or other persons with respect to suspected violations of Subsection 13-10-8(2)(b). 1998

CHAPTER 11

CONSUMER SALES PRACTICES

Section

13-11-1. Citation of act.

This act shall be known and may be cited as the "Utah Consumer Sales Practices Act." 1973

13-11-2. Construction and purposes of act.

This act shall be construed liberally to promote the following policies:

(1) to simplify, clarify, and modernize the law governing consumer sales practices;

(2) to protect consumers from suppliers who commit deceptive and unconscionable sales practices;

(3) to encourage the development of fair consumer sales practices;

(4) to make state regulation of consumer sales practices not inconsistent with the policies of the Federal Trade Commission Act relating to consumer protection;

(5) to make uniform the law, including the administrative rules, with respect to the subject of this act among those states which enact similar laws; and

(6) to recognize and protect suppliers who in good faith comply with the provisions of this act. 1973

13-11-3. Definitions.

As used in this chapter:

(1) "Charitable solicitation" means any request directly or indirectly for money, credit, property, financial assistance, or any other thing of value on the plea or representation that it will be used for a charitable purpose. A charitable solicitation may be made in any manner, including:

(a) any oral or written request, including a telephone request;

(b) the distribution, circulation, or posting of any handbill, written advertisement, or publication,

(c) the sale of, offer or attempt to sell, or request of donations for any book, card, chance, coupon, device, magazine, membership, merchandise, subscription, ticket, flower, flag, button, sticker, ribbon, token, trinket, tag, souvenir, candy, or any other article in connection with which any appeal is made for any charitable purpose, or where the name of any charitable organization or movement is used or referred to as an inducement or reason for making any purchase donation, or where, in connection with any sale or donation, any statement is made that the whole or any part of the proceeds of any sale or donation will go to or be donated to any charitable purpose. A charitable solicitation is considered complete when made, whether or not the organization or person making the solicitation receives any contribution or makes any sale.

(2) "Consumer transaction" means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance),

to a person for primarily personal, family, or household purposes, or for purposes that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged, or a solicitation or offer by a supplier with respect to any of these transfers or dispositions. It includes any offer or solicitation, any agreement, any performance of an agreement with respect to any of these transfers or dispositions, and any charitable solicitation as defined in this section.

(3) "Enforcing authority" means the Division of Consumer Protection.

(4) "Final judgment" means a judgment, including any supporting opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired.

(5) "Person" means an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or any other legal entity.

(6) "Supplier" means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer. 1987

13-11-4. Deceptive act or practice by supplier.

(1) A deceptive act or practice by a supplier in connection with a consumer transaction violates this chapter whether it occurs before, during, or after the transaction.

(2) Without limiting the scope of Subsection (1), a supplier commits a deceptive act or practice if the supplier knowingly or intentionally:

(a) indicates that the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits, if it has not;

(b) indicates that the subject of a consumer transaction is of a particular standard, quality, grade, style, or model, if it is not;

(c) indicates that the subject of a consumer transaction is new, or unused, if it is not, or has been used to an extent that is materially different from the fact;

(d) indicates that the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(e) indicates that the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;

(f) indicates that the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(g) indicates that replacement or repair is needed, if it is not;

(h) indicates that a specific price advantage exists, if it does not;

(i) indicates that the supplier has a sponsorship, approval, or affiliation the supplier does not have;

(j) indicates that a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations, if the representation is false;

(k) indicates that the consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction;

(l) after receipt of payment for goods or services, fails to ship the goods or furnish the services within the time advertised or otherwise represented or, if no specific time is advertised or represented, fails to ship the goods or furnish the services within 30 days, unless within the applicable time period the supplier provides the buyer with the option to either cancel the sales agreement and receive a refund of all previous payments to the supplier or to extend the shipping date to a specific date proposed by the supplier, but any refund shall be mailed or delivered to the buyer within ten business days after the seller receives written notification from the buyer of the buyer's right to cancel the sales agreement and receive the refund;

(m) fails to furnish a notice of the purchaser's right to cancel a direct solicitation sale within three business days of the time of purchase if the sale is made other than at the supplier's established place of business pursuant to the supplier's mail, telephone, or personal contact and if the sale price exceeds $25, unless the supplier's cancellation policy is communicated to the buyer and the policy offers greater rights to the buyer than this Subsection (2)(m), which notice shall be a conspicuous statement written in dark bold at least 12 point type, on the first page of the purchase documentation, and shall read as follows: "YOU, THE BUYER, MAY CANCEL THIS CONTRACT AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY (or time period reflecting the supplier's cancellation policy but not less than three business days) AFTER THE DATE OF THE TRANSACTION OR RECEIPT OF THE PRODUCT, WHICHEVER IS LATER.";

(n) promotes, offers, or grants participation in a pyramid scheme as defined under Title 76, Chapter 6a, Pyramid Scheme Act;

(o) represents that the funds or property conveyed in response to a charitable solicitation will be donated or used for a particular purpose or will be donated to or used by a particular organization, if the representation is false; or

(p) if a consumer indicates his intention of making a claim for a motor vehicle repair against his motor vehicle insurance policy:

(i) commences the repair without first giving the consumer oral and written notice of:

(A) the total estimated cost of the repair; and

(B) the total dollar amount the consumer is responsible to pay for the repair, which dollar amount may not exceed the applicable deductible or other copay arrangement in the consumer's insurance policy; or

(ii) requests or collects from a consumer an amount that exceeds the dollar amount a consumer was initially told he was responsible to pay as an insurance deductible or other copay arrangement for a motor vehicle repair under Subsection (2)(p)(i), even if that amount is less than the full amount the motor vehicle insurance policy requires the insured to pay as a deductible or other copay arrangement, unless:

(A) the consumer's insurance company denies that coverage exists for the repair, in which case, the full amount of the repair may be charged and collected from the consumer; or

(B) the consumer misstates, before the repair is commenced, the amount of money the insurance policy requires the consumer to pay as a deductible or other copay arrangement, in which case, the supplier may charge and collect from the consumer an amount that does not exceed the amount the insurance policy requires the consumer to pay as a deductible or other copay arrangement. 1999

13-11-5. Unconscionable act or practice by supplier.

(1) An unconscionable act or practice by a supplier in connection with a consumer transaction violates this act whether it occurs before, during, or after the transaction.

(2) The unconscionability of an act or practice is a question of law for the court. If it is claimed or appears to the court that an act or practice may be unconscionable, the parties shall be given a reasonable opportunity to present evidence as to its setting, purpose, and effect to aid the court in making its determination.

(3) In determining whether an act or practice is unconscionable, the court shall consider circumstances which the supplier knew or had reason to know. 1973

13-11-6. Service of process.

In addition to any other method provided by rule or statute, personal jurisdiction over a supplier may be acquired in a civil action or proceeding instituted in the district court by the service of process in the following manner. If a supplier engages in any act or practice in this state governed by this act, or engages in a consumer transaction subject to this act, he may designate an agent upon whom service of process may be made in this state. The agent must be a resident of or a corporation authorized to do business in this state. The designation must be in writing and filed with the Division of Corporations and Commercial Code. If no designation is made and filed, or if process cannot be served in this state upon the designated agent, whether or not the supplier is a resident of this state or is authorized to do business in this state, process may be served upon the director of the Division of Corporations and Commercial Code, but service upon him is not effective unless the plaintiff promptly mails a copy of the process and pleadings by registered or certified mail to the defendant at his last reasonably ascertainable address. An affidavit of compliance with this section must be filed with the clerk of the court on or before the return day of the process, if any, or within any future time the court allows. 1991

13-11-7. Duties of enforcing authority — Confidentiality of identity of persons investigated — Civil penalty for violation of restraining or injunctive orders.

(1) The enforcing authority shall:

(a) enforce this chapter throughout the state;

(b) cooperate with state and local officials, officials of other states, and officials of the federal government in the administration of comparable statutes;

(c) inform consumers and suppliers on a continuing basis of the provisions of this chapter and of acts or practices that violate this chapter including mailing information concerning final judgments to persons who request it, for which he may charge a reasonable fee to cover the expense;

(d) receive and act on complaints; and

(e) maintain a public file of final judgments rendered under this chapter that have been either reported officially or made available for public dissemination under Subsection (1)(c), final consent judgments, and to the extent the enforcing authority considers appropriate, assurances of voluntary compliance.

(2) In carrying out his duties, the enforcing authority may not publicly disclose the identity of a person investigated unless his identity has become a matter of public record in an enforcement proceeding or he has consented to public disclosure.

(3) On motion of the enforcing authority, or on its own motion, the court may impose a civil penalty of not more than $5,000 for each day a temporary restraining order, preliminary injunction, or permanent injunction issued under this chapter is violated, if the supplier received notice of the restraining or injunctive order. Civil penalties imposed under this section shall be paid to the General Fund. 1987

13-11-8. Powers of enforcing authority.

(1) The enforcing authority may conduct research, hold public hearings, make inquiries, and publish studies relating to consumer sales acts or practices.

(2) The enforcing authority shall adopt substantive rules that prohibit with specificity acts or practices that violate Section 13-11-4 and appropriate procedural rules. 1973

13-11-9. Rule-making requirements.

(1) In addition to complying with other rule-making requirements imposed by this act, the enforcing authority shall:

(a) adopt as a rule a description of the organization of his office, stating the general course and method of operation of his office and method whereby the public may obtain information or make submissions or requests;

(b) adopt rules of practice setting forth the nature and requirements of all formal and informal procedures available, including a description of the forms and instructions used by the enforcing authority of his office; and

(c) make available for public inspection all rules, written statements of policy, and interpretations formulated, adopted, or used by the enforcing authority in discharging his functions.

(2) A rule of the enforcing authority is invalid, and may not be invoked by the enforcing authority for any purpose, until it has been made available for public inspection under Subsection (1). This provision does not apply to a person who has knowledge of a rule before engaging in an act or practice that violates this act. 1973

13-11-10 to 13-11-15. Repealed. 1983, 1988

13-11-16. Investigatory powers of enforcing authority.

(1) If, by his own inquiries or as a result of complaints, the enforcing authority has reason to believe that a person has engaged in, is engaging in, or is about to engage in an act or practice that violates this act, he may administer oaths and affirmations, subpoena witnesses or matter, and collect evidence.

(2) If matter that the enforcing authority subpoenas is located outside this state, the person subpoenaed may either make it available to the enforcing authority at a convenient location within the state or pay the reasonable and necessary expenses for the enforcing authority or his representative to examine the matter at the place where it is located. The enforcing authority may designate representatives, including officials of the state in which the matter is located, to inspect the matter on his behalf, and he may respond to similar requests from officials of other states.

(3) Upon failure of a person without lawful excuse to obey a subpoena and upon reasonable notice to all persons affected, the enforcing authority may apply to the court for an order compelling compliance.

(4) In the event a witness asserts a privilege against self-incrimination, testimony and evidence from the witness may be compelled pursuant to Title 77, Chapter 22b, Grants of Immunity. 1997

13-11-17. Actions by enforcing authority.

(1) The enforcing authority may bring an action:

(a) to obtain a declaratory judgment that an act or practice violates this chapter;

(b) to enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is otherwise likely to violate this chapter; and

(c) to recover, for each violation, actual damages, or obtain relief under Subsection (2)(b), on behalf of consum-

ers who complained to the enforcing authority within a reasonable time after it instituted proceedings under this chapter.

(2) (a) The enforcing authority may bring a class action on behalf of consumers for the actual damages caused by an act or practice specified as violating this chapter in a rule adopted by the enforcing authority under Subsection 13-11-8(2) before the consumer transactions on which the action is based, or declared to violate Section 13-11-4 or 13-11-5 by final judgment of courts of general jurisdiction and appellate courts of this state that was either reported officially or made available for public dissemination under Subsection 13-11-7(1)(c) by the enforcing authority ten days before the consumer transactions on which the action is based, or, with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment that became final before the consumer transactions on which the action is based.

(b) (i) On motion of the enforcing authority and without bond in an action under this subsection, the court may make appropriate orders, including appointment of a master or receiver or sequestration of assets, but only if it appears that the defendant is threatening or is about to remove, conceal, or dispose of the defendant's property to the damage of persons for whom relief is requested. An appropriate order may include an order:

(A) to reimburse consumers found to have been damaged;

(B) to carry out a transaction in accordance with consumers' reasonable expectations;

(C) to strike or limit the application of unconscionable clauses of contracts to avoid an unconscionable result; or

(D) to grant other appropriate relief.

(ii) The court may assess the expenses of a master or receiver against a supplier.

(c) If an act or practice that violates this chapter unjustly enriches a supplier and damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence shall be transferred to the state treasurer pursuant to Title 67, Chapter 4a, Unclaimed Property Act.

(d) If a supplier shows by a preponderance of the evidence that a violation of this chapter resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under Subsection (2) is limited to the amount, if any, by which the supplier was unjustly enriched by the violation.

(e) An action may not be brought by the enforcing authority under Subsection (2) more than two years after the occurrence of a violation of this chapter.

(3) (a) The enforcing authority may terminate an investigation or an action other than a class action upon acceptance of the supplier's written assurance of voluntary compliance with this chapter. Acceptance of an assurance may be conditioned on a commitment to reimburse consumers or take other appropriate corrective action.

(b) An assurance is not evidence of a prior violation of this chapter. Unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation.

(4) (a) In addition to other penalties and remedies set out under this chapter, and in addition to its other enforcement powers under Title 13, Chapter 2, Division of Consumer Protection, the division director may issue a cease and desist order and impose an administrative fine of up to $1,000 for each violation of this chapter.

(b) All money received through administrative fines imposed under this section shall be deposited in the Consumer Protection Education and Training Fund created by Section 13-2-8. 1995

13-11-17.5. Costs and attorney's fees.

Any judgment granted in favor of the enforcing authority in connection with the enforcement of this chapter shall include, in addition to any other monetary award or injunctive relief, an award of reasonable attorney's fees, court costs, and costs of investigation 1987

13-11-18. Noncompliance by supplier subject to other state supervision — Cooperation of enforcing authority and other official or agency.

(1) If the enforcing authority receives a complaint or other information relating to noncompliance with this act by a supplier who is subject to other supervision in this state, the enforcing authority shall inform the official or agency having that supervision. The enforcing authority may request information about suppliers from the official or agency.

(2) The enforcing authority and any other official or agency in this state having supervisory authority over a supplier shall consult and assist each other in maintaining compliance with this act. Within the scope of their authority, they may jointly or separately make investigations, prosecute suits, and take other official action they consider appropriate. 1973

13-11-19. Actions by consumer.

(1) Whether he seeks or is entitled to damages or otherwise has an adequate remedy at law, a consumer may bring an action to:

(a) obtain a declaratory judgment that an act or practice violates this chapter; and

(b) enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is likely to violate this chapter.

(2) A consumer who suffers loss as a result of a violation of this chapter may recover, but not in a class action, actual damages or $2,000, whichever is greater, plus court costs.

(3) Whether a consumer seeks or is entitled to recover damages or has an adequate remedy at law, he may bring a class action for declaratory judgment, an injunction, and appropriate ancillary relief against an act or practice that violates this chapter.

(4) (a) A consumer who suffers loss as a result of a violation of this chapter may bring a class action for the actual damages caused by an act or practice specified as violating this chapter by a rule adopted by the enforcing authority under Subsection 13-11-8(2) before the consumer transactions on which the action is based, or declared to violate Section 13-11-4 or 13-11-5 by a final judgment of the appropriate court or courts of general jurisdiction and appellate courts of this state that was either officially reported or made available for public dissemination under Subsection 13-11-7(1)(c) by the enforcing authority ten days before the consumer transactions on which the action is based, or with respect to a supplier who agreed to it, was prohibited specifically by the terms of a consent judgment which became final before the consumer transactions on which the action is based.

(b) If an act or practice that violates this chapter unjustly enriches a supplier and the damages can be computed with reasonable certainty, damages recoverable on behalf of consumers who cannot be located with due diligence shall be transferred to the state treasurer pursuant to Title 67, Chapter 4a, Unclaimed Property Act.

(c) If a supplier shows by a preponderance of the evidence that a violation of this chapter resulted from a

bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this section is limited to the amount, if any, in which the supplier was unjustly enriched by the violation.

(5) Except for services performed by the enforcing authority, the court may award to the prevailing party a reasonable attorney's fee limited to the work reasonably performed if:

(a) the consumer complaining of the act or practice that violates this chapter has brought or maintained an action he knew to be groundless; or a supplier has committed an act or practice that violates this chapter; and

(b) an action under this section has been terminated by a judgment or required by the court to be settled under Subsection 13-11-21(1)(a).

(6) Except for consent judgment entered before testimony is taken, a final judgment in favor of the enforcing authority under Section 13-11-17 is admissible as prima facie evidence of the facts on which it is based in later proceedings under this section against the same person or a person in privity with him.

(7) When a judgment under this section becomes final, the prevailing party shall mail a copy to the enforcing authority for inclusion in the public file maintained under Subsection 13-11-7(1)(e).

(8) An action under this section must be brought within two years after occurrence of a violation of this chapter, or within one year after the termination of proceedings by the enforcing authority with respect to a violation of this chapter, whichever is later. When a supplier sues a consumer, he may assert as a counterclaim any claim under this chapter arising out of the transaction on which suit is brought. 1995

13-11-20. Class actions.

(1) An action may be maintained as a class action under this act only if:

(a) the class is so numerous that joinder of all members is impracticable;

(b) there are questions of law or fact common to the class;

(c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;

(d) the representative parties will fairly and adequately protect the interests of the class; and

(e) either:

(i) the prosecution of separate actions by or against individual members of the class would create a risk of:

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual members of the class that would as a practical matter dispose of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(ii) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(iii) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

(2) The matters pertinent to the findings under Subsection (1)(e)(iii) include:

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(d) the difficulties likely to be encountered in the management of a class action.

(3) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and it may be amended before decision on the merits.

(4) In a class action maintained under Subsection (1)(e) the court may direct to the members of the class the best notice practicable under the circumstances, including individual notice to each member who can be identified through reasonable effort. The notice shall advise each member that:

(a) the court will exclude him from the class, unless he requests inclusion, by a specified date;

(b) the judgment, whether favorable or not, will include all members who request inclusion; and

(c) a member who requests inclusion may, if he desires, enter an appearance through his counsel.

(5) When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class.

(6) In the conduct of a class action the court may make appropriate orders:

(a) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(b) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in the manner the court directs to some or all of the members or to the enforcing authority of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(c) imposing conditions on the representative parties or on intervenors;

(d) requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly; or

(e) dealing with similar procedural matters.

(7) A class action shall not be dismissed or compromised without approval of the court. Notice of the proposed dismissal or compromise shall be given to all members of the class as the court directs.

(8) The judgment in an action maintained as a class action under Subsection (1)(e)(i) or (ii), whether or not favorable to the class, shall describe those whom the court finds to be members of the class. The judgment in a class action under Subsection (1)(e)(iii), whether or not favorable to the class, shall specify or describe those to whom the notice provided in Subsection (4) was directed, and who have requested inclusion, and whom the court finds to be members of the class. 1992

13-11-21. Settlement of class action — Complaint in class action delivered to enforcing authority.

(1) (a) A defendant in a class action may file a written offer of settlement. If it is not accepted within a reasonable time by a plaintiff class representative, the defendant may file an affidavit reciting the rejection. The court may determine that the offer has enough merit to present to